IN THE

Supreme Court of the United States

No. 674, October Term, 1928

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY E. DAVIS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO, THE VILLAGE OF MAUMEE, OHIO, THE VILLAGE OF WATERVILLE, OHIO, AND THE CITY OF TOLEDO, OHIO,

Appellants,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY,

Appellee.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division

BRIEF ON BEHALF OF APPELLEE

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Appellants,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY,

Appellee.

BRIEF ON BEHALF OF APPELLEE

I

STATEMENT OF THE CASE

A. NATURE OF CASE, COURT OPINION, AND JURISDICTION

This case is an appeal from the final decree (R. 185) on opinion of the District Court (R. 170), not officially reported, granting and entering a permanent injunction

in favor of appellee against appellant here, defendant below, Harry J. Kirk, as a state officer of Ohio, *viz.*, state highway director of that state, and against the other appellants here, defendants below, as proper but not necessary defendants, in a suit instituted by appellee in the District Court of the United States for the Southern District of Ohio, Eastern Division, at Columbus.

The purpose of the suit was, as shown by the allegations and prayer of the bill of complaint (R. 1), to secure, for appellee, a temporary restraining order, an interlocutory injunction and finally a permanent injunction suspending and enjoining enforcement, operation and execution of a statute of Ohio by restraining and enjoining the action of such state officer in the enforcement and execution of such statute, on the ground that the statute is unconstitutional, in that (a) it impairs the obligations of seven water and land granting, selling and leasing contracts between the State of Ohio and appellee under which appellee secured and has the right to use certain of Ohio's Miami and Erie Canal lands and to take water for hydraulic purposes from Ohio's Miami and Erie Canal, and that the Act deprives appellee of its property in such contracts without due process of law; (b) that it impairs the obligation of another certain contract entered into between the State of Ohio and the City of Toledo, Ohio, for the use and benefit of appellee, and it deprives appellee of its property in such contract without due process of law.

The Miami and Erie Canal (so named under an Act of March 14, 1849, 47 O. L. 44, Paragraph 30 Appendix to this brief, page 219) was one of a number of canals

projected, constructed and owned by the State of Ohio, and on completion thereof, in 1845, it extended from its connection with the Ohio River northerly through the cities of Cincinnati and Dayton, to the Mad River and on to and through the City of Defiance, in the northwestern part of Ohio, to the Maumee River; thence southwesterly to the west Ohio state line and northeasterly to a point a few miles northeasterly of Defiance where it entered the Maumee River, and that river was then used as the canal to the Village (unincorporated) of Providence, in Lucas County, Ohio. At that village the canal was connected with the Maumee River on the north bank thereof and extended northeasterly along the river through the villages of Waterville and Maumee and on, into and through the City of Toledo to Lake Erie, the villages named and Toledo being in Lucas County, Ohio. These canals were constructed by Ohio for two purposes, first, navigation, and second, developing hydraulic power wherever possible thereon and selling or leasing lands along and water from such canals, not needed for navigation, to private parties for hydraulic purposes. Navigation on the Miami and Erie Canal was abandoned practically thirty-five years ago, and prior, with one exception, to the making of appellee's contracts, the exception being a reservation and exception by a grantor of water in a perpetual grant of water to Ohio. On the south bank of the Maumee River opposite the Village of Providence is the Village of Grand Rapids, formerly Gilead, Wood County, Ohio. In the construction of this canal the state constructed and owns what is known as the Grand Rapids State Dam, extending from the north bank of the river at the Village of Providence southerly

across the river to the Village of Grand Rapids. The part of this canal in question here begins at its connection with the Maumee River above the Grand Rapids dam and extends on northeasterly along the river into the City of Toledo to its present northern terminus and outlet into Swan Creek. The water in the Maumee River and in this part of the canal runs northeasterly at all times. All water passing from the canal into Swan Creek goes on through the creek into the Maumee River and the Maumee River empties into Lake Erie.

This part of the canal is shown on a map, Stipulation Exhibit No. 25 (R. 169), and for the purposes of this case must be considered in two parts, which for convenience we designate Lineal Part 1 and Lineal Part 2. Lineal Part 1 is approximately eight and one-half miles long and extends from the outlet of the canal at its present northern terminus, southwesterly up the Maumee River through the Village of Maumee and to the Maumee side-cut, as shown on Stipulation Exhibit No. 25. Lineal Part 2 is approximately sixteen and one-half miles long and extends from the northeasterly side of the Maumee side-cut, i. e., from southwesterly end of Lineal Part 1 on southwesterly up the river to its connection with the river above the Grand Rapids State Dam. Within these two parts is a part known as the "Eighteen-Mile Level" extending from Lock 9 or Guard Lock, at Providence, northeasterly to Lock 45. (Stipulation Exhibit 25, Map; R. 169.)

The construction of the Miami and Erie Canal was authorized by the enabling Act of the General Assembly of Ohio passed February 4, 1825 (23 O. L. 50, Vol. 2, Chase's Statutes, page 1472), and certain parts of it

were by that Act ordered to be put under contract for construction. (Paragraph 6, Appendix, page 200.) This Act provided for the appointment by the General Assembly of a board of canal commissioners to carry on the construction of the canal and thereafter to administer the operation thereof.

By an Act passed February 11, 1828 (Vol. 3, Chase's Statutes, page 1598, Paragraph 11, Appendix, page 206), this board was given power to sell any water which in its opinion might be spared from any state canal or works connected therewith, without injury to navigation, for a term of years, in its discretion, to the person who should bid the highest annual rent therefor.

By an Act passed February 18, 1830 (Vol. 3, Chase's Statutes, page 1659, Paragraph 15, Appendix, page 208), express authority was given the canal commissioners to sell from time to time for hydraulic purposes, subject to such conditions and reservations as the commissioners might deem necessary and proper, either *in perpetuity* or for *a term of years*, for an annual rent *or otherwise*, as deemed for the best interests of the state, the surplus water in either of the canals of the state above the quantity required for purposes of navigation. Water passing around locks was included in the term "surplus water." This Act also gave the state power to sell lands for the same purposes. By the Act every lease, grant or conveyance of water was required to contain a reservation and condition whereby the state could at any time resume the privilege or right to the use of the water thus leased or sold in whole or in part when *deemed necessary* for the *purposes of navigation* or whenever its use for hydraulic purposes should be found in any

way to interfere with and injuriously affect the *navigation* of either of the canals. No other provision for the resumption of the water appears in the Act. These provisions, Sections 3 to 7 of this Act, were carried into the Act passed March 23, 1840 (38 O. L., 87 Swan's Statutes of Ohio, 1841, pages 174 to 200, Paragraph 27, Appendix, page 215), and in this latter Act became Sections 20 to 24, inclusive, without change except that the board of canal commissioners in this latter Act is designated as the board of public works.

Under these statutes and an Act of 1902, hereafter described, appellee acquired seven grants or contracts (Stipulation Exhibits Nos. 1 to 7, inclusive; R. 68, 74, 77, 82, 88, 95 and 101), securing to it the right to use certain Miami and Erie Canal lands and to take water from the Miami and Erie Canal at the Village of Maumee, Ohio, and use the same for hydraulic purposes in the operation of its hydro-electric plant situated just south of Lineal Part 1 of the canal as described above and on the northerly bank of the Maumee River. (See Stipulation Exhibit No. 25, R. 169.) By the express terms of one of these contracts, the supplementary lease hereinafter described, the State of Ohio agrees to let into this canal from the pool of the Maumee River above the Grand Rapids State Dam all the water that the canal will carry to its safe capacity down through Lineal Part 2 and through the southwesterly 1 6/10th miles of Lineal Part 1 to the water flume of appellee carrying appellee's portion of such water to its hydro-electric plant for operation of the plant in the generation of electricity for light, heat and power. Appellee's portion of such water is 422 cubic feet per second out of the 536 cubic feet per

second carried by the canal. (R. 164.) The difference between appellee's portion of 422 second feet and 536 second feet is used under two other leases for the purpose of operating a flour mill, Pilliod mill, at Providence, and The Toledo Grain & Milling Company mill at Toledo, one of these leases being Stipulation Exhibits 8 and 9, and the other being Stipulation Exhibit 10. (R. 104, 110 and 116.)

Under the terms of appellee's contracts no other contracts may be made for water in Lineal Parts 1 or 2 and there are no other contracts than the ones mentioned above. (Stipulation and Agreement, Sec. 17, R. 65.)

Appellee acquired its first and principal lease, known as the Law lease (Stipulation Exhibit No. 1, R. 68), September 11, 1900, through assignment from the original grantee, with consent of the board of public works. This lease, now running under a renewal term as hereinafter described, extends for a period of thirty years from March 12, 1925.

Appellee's other contracts extend throughout varying terms in the future except the James Purdy grant (R. 101) and the one known as the supplementary agreement and lease (Stipulation Exhibit No. 2, R. 74). This supplementary lease extends contemporaneously with the Law lease. The Purdy grant is a grant of water by Purdy to Ohio with reservation of water rights in perpetuity. These contracts will be more particularly hereinafter described.

The hydro-electric plant has a minimum value of over $200,000.00, and the water rights under the contracts have a minimum value in excess of $400,000.00 (Stipulation Exhibit No. 24, R. 165 to 168.)

All the water called for by the contracts must come from the pool of the Maumee River above the Grand Rapids dam down through Lineal Part 2 and on through the southwesterly 1 6/10ths miles of Lineal Part 1 of the canal to the hydro-electric plant. There is no other source from which water may be received for the operation of the plant, and without the construction of another plant, there is no other plant at which the water may be used. But such water may be so used with large profit to appellee throughout the terms of such contracts (R. 20).

Through an Act passed January 22, 1920 (108 O. L., Part 2, 1138-1141, Paragraph 37, Appendix, p. 230), the General Assembly declared the abandonment for both canal and hydraulic purposes

> ("subject, however, to the rights hereinafter under Sections 6 and 7 provided for")

of that portion of the canal described above as Lineal Part 1. By the same Act the City of Toledo was given an option to buy the abandoned portion, Lineal Part 1, at a price to be determined by a board of appraisement, subsequently fixed at $300,000.00, plus the additional consideration provided for in said Sections 6 and 7 of the Act. These two sections made provision for a deed to be given to the City of Toledo "conveying such property in fee simple to the City of Toledo," etc., "*but excepting therefrom and subject to the rights of owners of existing leases of either lands or water, or both, and the rights of such owners to a renewal of said existing leases.*"

Section 7 provides that "*in case the state's lessees are* at any time under the terms of this Act *deprived of*

their water privileges, the City of Toledo *shall pay such lessees a fair compensation for the loss of the water to which they are entitled,* and in case the amount of compensation cannot mutually be agreed upon, the City of Toledo shall proceed under the provisions of the General Code *to condemn the rights of such lessees* for the use of said municipality."

Toledo in pursuance of resolution Stipulation Exhibit 11 (R. 122) paid the state the $300,000.00 and received a deed (R. 133) which described the property conveyed, Lineal Part 1, and immediately after the description there followed the words, "excepting therefrom and subject to the rights of owners of existing leases of either lands or water, or both, and excepting therefrom and subject to the rights of such owners to a renewal of such existing leases." The *habendum* clause of the deed reads, "to have and to hold said premises as fully and completely and subject to all such conditions and restrictions as the State of Ohio might or should convey the said premises by virtue of the provisions of the aforesaid Act of the General Assembly of Ohio." At the time of this purchase by Toledo of Lineal Part 1 the city was aware of appellee's claimed water rights under its contracts here in question. (R. 61.) On September 10, 1923, Toledo, through ordinance, authorized its director of service to settle with appellee but no settlement was made. (Stipulation Exhibit 12, R. 124.) "Defiance Gas & Power Co." should have read, "The Maumee Valley Electric Co."

Since the conveyance by the state to Toledo of this property the city has refused to recognize any rights in appellee under its contracts and has refused to compen-

sate it for its rights thereunder, either by mutual agreement or by condemnation. On March 9, 1925, the council of the city, through formal resolution (R. 125), directed its director of public service at once to cut off the flow of the water in the canal at the southwesterly end of Lineal Part 1, at Maumee side-cut, and to construct the necessary bulkheads or other devices necessary to divert the flow of the water from the canal into the Maumee river through the Maumee side-cut. (See Stipulation Exhibit 25, R. 169.) This action would have totally destroyed appellee's water rights and rendered the hydro-electric plant valueless except as junk. (Stipulation Exhibit No. 24, R. 162, 165.)

On the passing of the above resolution, appellee instituted a suit in the District Court of the United States for the Northern District of Ohio, Western Division, at Toledo, and secured a temporary restraining order against such diversion by the city of the water. On final hearing the bill of complaint was dismissed (R. 137), but on appeal to the United States Circuit Court of Appeals for the Sixth Circuit the case was reversed (Decree, R. 138) and the Court of Appeals issued its mandate to the District Court directing that a permanent injunction be issued against the city enjoining it from interfering with the flow of the water in any respect until the city should pay appellee for its water rights under its contracts, either by mutual agreement or through condemnation proceedings. (Injunctive Decree on Mandate, R. 138.) The Court of Appeals in its opinion held that by the acceptance of the deed from the state for the property the city entered into a *contract* with the state for the *benefit* of appellee under which it was bound

either to pay appellee the compensation provided for in the act as construed by the Court of Appeals or permit the water to run to the hydro-electric plant according to the terms of the contracts.

(*Maumee Valley Electric Company vs. City of Toledo et al.*, 13 Fed. Second Series, 98-105.) The city petitioned for a writ of *certiorari* from this court but the writ was denied. (Case No. 554, October Term, 1926, U. S. Supreme Court.)

Instead of paying appellee for its water rights, Toledo and the other municipal defendants secured the introduction of and urged (R. 66 and 67) the passage of the Act attacked in this case, passed May 11, 1927. (112 O. L., pages 360 to 363, Paragraph 39 Appendix, page 236.) This Act declares an abandonment of Lineal Part 2 of the canal, both for canal and hydraulic purposes. It took effect on August 10, 1927. In Sections 4 and 5 the Act declares as follows:

> "Section 4: All leases heretofore granted to any person, firm or corporation for canal or hydraulic purposes on that part of the Miami and Erie canal described in Section 1 of this Act, shall become and be null and void on and after sixty days from the taking effect of this Act, and all other leases for lands heretofore granted upon such portion of the canal shall be terminated according to the terms of this Act as the same can be legally done."
>
> "Section 5: The abandoned portion of said canal shall be under the supervision and control of the state highway director to be devoted to highway and park uses and purposes as herein provided, and the director of highways of the State of Ohio is hereby authorized to and he shall within sixty days of the taking effect of this Act drain the water out of said abandoned portion and

> prevent the water of the Maumee river from flowing into or through said abandoned part of said canal."

Section 8 of the Act provides that until said highway shall be constructed and improved no portion of the land to be used as a highway according to the terms of the Act shall be leased for any purpose whatever,

> "but until the State of Ohio shall construct and improve said lands for a highway all municipal corporations through which said highway shall pass when completed and the commissioners of Lucas County, Ohio, shall be permitted to use said canal land for public purposes only, without compensation."

By Section 10 of the Act the county commissioners of Lucas county and the council or other legislative body of any municipality or township through which said abandoned canal passes are given the right to remove existing highway bridges crossing said abandoned portion and to fill up the canal at such places to a grade to be approved by the director of highways,

> "and the county commissioners of Lucas County are *authorized* to drain the water of said abandoned portion and to prevent the water from the river flowing into or through said abandoned part of said canal, but reserving all rights of the said State of Ohio across said roadways for any and all purposes said state or its grantees may hereafter desire to use said roadways not in conflict therewith."

"Section 1" referred to in Section 4 as quoted above describes Lineal Part 2 of the canal.

This Act was not passed because of any default on the part of appellee. It is admitted in the pleadings and

in the stipulation and agreement between the parties on the evidence that appellee has performed and still is performing all of its obligations and duties under its several contracts (R. 61).

Before the taking effect of the above Act and on July 29, 1927, appellee filed this suit and thereupon made application for a temporary restraining order as prayed for in the bill. (R. 23.) Such an order was granted by Hon. Benson W. Hough, district judge, and filed July 29, 1927, and bond given. (R. 24.) This order was extended by Judge Hough at ten-day periods to September 27, 1927. (R. 27, 28, 29.) In the meantime, application had been made for an interlocutory injunction as prayed for in the bill of complaint, and on September 24, 1927, such an order was filed by Hon. Maurice H. Donahue, circuit judge; Hon. Benson W. Hough, district judge, and Hon. D. C. Westenhaver, district judge, and bond given. (R. 179.)

The suit was so instituted against George F. Schlesinger as superintendent of public works and director of the department of highways and public works of the State of Ohio, and the other defendants. Schlesinger resigned and left office on June 15, 1928. Thereafter, on September 8, 1928, a motion was filed by appellee in the case for an order substituting Harry J. Kirk as defendant in the place of Schlesinger, Kirk having been appointed to succeed Schlesinger in the office. (R. 183.) Harry J. Kirk consented to the substitution and entered appearance in the cause, and an order of the court substituting him as such party defendant was filed on that day, September 8, 1928. (R. 183 and 184.)

The case was submitted on final hearing on April 14,

1928, before Judges Hon. Maurice H. Donahue, circuit judge, Hon. Benson W. Hough and Hon. Smith Hicklenlooper, district judges, as a court constituted under Section 266 of the Judicial Code, Section 380 of Title 28 of the new United States Code, on the bill of complaint (R. 1), the answers (R. 29), a stipulation and agreement between the parties on the evidence (R. 57), Stipulation Exhibits Nos. 1 to 25, inclusive (R. 68 to 169), and argument of counsel. Thereafter the judges filed their opinion and a final decree was entered as shown at the beginning of this statement.

The bill of complaint (R. 1), in addition to stating the facts set forth above and other detailed facts hereinafter set out shows that appellee is a corporation, incorporated, organized and existing since prior to the year 1900, under the laws of the State of Ohio, with its principal office and place of business at the City of Toledo, Ohio, of which city and state it is a citizen, residing in the Western Division of the Northern United States Judicial District of Ohio; that it was and is so incorporated, organized and existing for the purpose of generating electricity and supplying the same to the public for light, heat and power purposes and for the purpose of acquiring, owning and holding all property of any and all kinds necessary or proper to be used in conducting said business, including the acquirement and holding of leases and other contracts for water to be used in the generation of electricity through hydro-electric power plants and otherwise; that the then defendant, George F. Schlesinger, was the duly appointed, qualified and acting superintendent of public works and director of the department of highways of the State of Ohio, and, as such,

had jurisdiction over, control and management of the property in question and that he was a citizen of Ohio and a resident and inhabitant of the City of Columbus, Ohio, within the jurisdiction of the District Court for the Southern District of Ohio, Eastern Division. The succession of the appellant, Harry J. Kirk, to the office of highway director, succeeding said original defendant, George F. Schlesinger, is shown above. The Bill further contains the usual allegation that the matter in controversy in the suit exceeds, exclusive of interest and cost, the sum of three thousand ($3000.00) dollars, and arises under the Constitution of the United States of America.

It also alleges that the Act makes no provision whatever for the protection of appellee in the enjoyment of its rights and privileges under its contracts, nor does it make any provision whatever for compensation to appellee in case the state highway director should drain the water from the canal or prevent the water from flowing into or through said canal to said hydro-electric plant or elsewhere, as required by appellee's said agreements.

The Bill also shows that the Act in question attempts arbitrarily and without making any provision for compensation to be paid to appellee for its rights and privileges under its contracts or for the loss of its plant, to declare such contracts null, void and of no effect, without any fault and not because of any default on the part of the appellee, in failing to comply with the terms of such contracts; and it alleges that the director of highways, in pursuance of the direction of said Act, was threatening to, and, unless restrained by the court, would proceed immediately upon the taking effect of the Act on August 10, 1927, to drain the water out of the canal

and prevent any water from flowing therein for the uses of appellee under its contracts, and thus take away from appellee all of said water called for by them and totally deprive appellee of the same without compensating it in any wise, to its great loss in that behalf, and without making any provision in any wise for a continuance of the flow of water, or any part thereof, in said canal for the use of appellee.

These allegations of threats are admitted by the answer of the state highway director (R. 34, 35), and by the answers of the other defendants (R. 41, 48). Except as to parties the answers are all alike.

B. QUESTIONS INVOLVED

The ultimate general question involved is whether the abandonment Act of 1927 attacked in this case (Paragraph 39, Appendix, p. 236) is contrary to Section 10 of Article 1 of the Constitution of the United States and Section 1 of Article 14 of the amendments to that Constitution, or either of said sections, (a) as impairing the obligation of appellee's contracts, Stipulation Exhibits Numbers 1 to 7, inclusive (R. 68 to 101), and as depriving appellee of its property therein without due process of law; and, (b) as impairing the obligations of said contract entered into between the State of Ohio and the City of Toledo in behalf of and for the benefit of appellee and as depriving appellee of its property therein without due process of law. In answering this question with respect to said contracts, there is involved the question as to the *capacity*, public or private, in which the State of Ohio owns its Miami and Erie canal lands, and if it owns such lands in its private or proprietary relation or status,

then by what rules of law must the State of Ohio be held to be governed in dealing with other parties through and in the making of such contracts?

C. HOW THE QUESTIONS ARISE

The issues arise out of the bill of complaint (R. 1), the answers of the defendants (R. 29 to 50), and the stipulation and agreement between the parties on the evidence (R. 57 to 67), with the Stipulation Exhibits Nos. 1 to 25, inclusive (R. 68 to 169). The facts as set forth in the bill of complaint are either admitted by the answers and the stipulation and agreement or established by legislative Acts and uncontroverted testimony of witnesses, which testimony is set forth in Stipulation Exhibit No. 24 (R. 160 to 169), no evidence having been offered on the trial in behalf of the appellants other than that contained in the stipulation. The case, therefore, presents no issues of fact and involves only questions of law as applied to the admitted facts stated above herein and the additional admitted facts hereinafter set out as follows:

(1) Ohio's System of Public Canals

(a) Aside from the Miami and Erie Canal there was constructed contemporaneously with its construction the Ohio Canal, in the eastern part of the state, extending from Cleveland south through Akron and other cities to the Muskingum River, which river was then used as the canal south to the Ohio River.

Practically at the same time there were constructed in the south and central part of the state south of Col-

umbus, Ohio, the Walhonding Canal, Hocking Canal, Sandy and Beaver Canal. The above canals, together with the Muskingum Improvement and the Western Reserve and Maumee Road, made up what was known as the Public Works of Ohio, including various dams, side-cuts, feeders, reservoirs, lock-houses, collectors' offices and weigh-locks, as constructions or devices necessary in the operation of said canals. (Par. 31, Appendix, p. 219.)

(b) *Authority for Construction of Ohio's Canals:* Authority for the construction and operation of Ohio's canals springs from the Constitutions of the state and legislative enactments in pursuance thereof. The first Constitution of Ohio, 1802, contained no specific provision with respect to canals or other public works. By Section 1 of Article 1 of that Constitution the legislative power of the state was vested in a general assembly and the power for constructing the public works of the state, including its canals, was lodged in the general assembly by that provision. Under that Constitution the entire public works of the state were provided for and constructed and under it they were operated through laws passed by the general assembly until the Constitution of 1851 was adopted. The next Constitution was adopted in 1851 and the only express provisions therein with respect to public works were Sections 12 and 13 of Article 8. Section 12 provided that so long as the state should have public works requiring superintendence there should be a board of public works, consisting of three members, elected by the people, and Section 13 provided that the powers and duties of this board and its several members should be such as then were or might be

prescribed by law. (Par. 1, Appendix, p. 195.) September 3rd, 1912, Section 12 was amended, providing that there should be a superintendent of public works appointed by the governor, with powers and duties then exercised by the board of public works until otherwise provided by law. Section 13 above mentioned was repealed on the same date.

(c) *Purpose of Ohio's Canals*: To ascertain the purposes for which the canals of Ohio were constructed, we must look to the legislative provisions authorizing and directing their construction, operation and management; and to determine the present status of their ownership and control by the State of Ohio and the capacity in which the state now owns and for a long time has owned and controlled the lands formerly devoted in part to navigable canals, and to determine by what rules of law the state must be governed in dealing with its citizens with reference to these lands, we must look not only to those legislative provisions but also to the changed social and commercial conditions now confronting the state and her citizens. The legislative acts providing for the construction and operation of these canals began with the Act passed February 23, 1820, 18 O. L. 147, Volume 2, Chase's Statutes, 1131, and other Acts were subsequently passed by the general assembly from time to time down to the Act of February 28, 1843, 41 O. L. 43, this being the Act which directed the completion of all parts of the Miami Extension Canal not then under contract, from the Mad River at Dayton, Ohio, north to the City of Defiance. There were twenty-eight of these Acts. They are described and parts of them pertinent to the

questions here are quoted in full in paragraphs 2 to 29, inclusive, of the Appendix. (Pp. 197 to 219.) The first five of these Acts providing for the construction of the state's system of canals have often been referred to as the Primary Acts for such construction, but under that designation we would include the other Acts above referred to, providing for not only the construction of those canals but also for the management and operation thereof during and after construction.

Appellants claim that these canals were constructed only for the purposes of public navigation. While it may be conceded that these canals would not have been constructed for the purpose alone of furnishing hydraulic power and it may be admitted that navigation was the principal purpose of such construction, appellee claims that a great object of the general assembly in the construction was that of furnishing water to private persons, firms and corporations for hydraulic purposes.

The first Act mentioned above, and the second Act passed January 31, 1822, 20 O. L. 31, Vol. 2, Chase's Statutes, 1220, each declared in effect in a preamble that navigable communications by means of a canal or canals between Lake Erie and the Ohio River would greatly promote the agricultural, *manufacturing* and commercial interests of the people of Ohio. These two Acts and the third and fourth Acts provided for canal commissioners, who were directed to employ engineers and ascertain the practicability of canals through the following routes: (1) Sandusky Bay to the Ohio River; (2) Maumee River to the Ohio River; (3) Lake Erie to the Ohio River by sources of Cuyahoga, Black and Muskingum Rivers; and (4) from the lake by sources of Grand and Mahoning

Rivers to Ohio River. (Paragraphs 2 to 5, inclusive, Appendix, pp. 197 to 200.) The above Acts were complied with and reports were made from time to time to the General Assembly.

The fifth Act was passed February 4, 1825, 23 O. L. 50, Volume 2, Chase's Statutes, 1472, entitled,

> "An Act to Provide for The Internal Improvement of the State of Ohio By Navigable Canals."

This Act provided a board of canal commissioners of seven members to be appointed by the general assembly; authorized employment of agents, engineers and surveyors and authorized the commissioners to commence and prosecute making of a navigable canal on Muskingum and Scioto Route to Lake Erie, and also a navigable canal on so much of the Maumee and Miami line as lay between Cincinnati and Mad River at Dayton; and created a canal fund for construction and a board of "commissioners" of the canal fund, of three members to continue in office for six (6) years, prescribing their powers and duties in borrowing and disbursing funds.

> This Act, Section 5, appropriates and pledges: "• • • all the net proceeds of tolls collected on the canals herein described *and of the rents and profits of all works and privileges* connected with or appertaining to said canals and belonging to the state."

Section 6 of this Act provides that certain moneys pledged and appropriated by the Act,

> " • • • together with the net proceeds of all tolls *and of the rents and profits of all works and privileges* connected with said canals shall be paid into the state treasury and shall be kept distinct and apart from other moneys belonging to the state."

The above quotations from this Primary Act are here given as definite proof of the intention of the general assembly to utilize the canals for other purposes than navigation, *i. e.*, hydraulic power and other similar purposes. Section 8 of this Act gives the power of eminent domain to the canal commissioners to appropriate, take possession of and use any lands, waters, streams and materials necessary for the prosecution of the improvements intended by the Act; provides how such property should be paid for and enacts that,

> "The fee simple of the premises so appropriated shall be vested in this state." (Paragraph 6, Appendix, p. 200.)

Subsequently to the passage of the fifth Act just described above the general assembly, beginning with the Act passed February 7, 1826, Volume 3, Chase's Statutes, 1527, and ending with the Act passed March 7, 1842, 40 O. L. 72, passed numerous Acts through which the canal commissioners or the board of public works were authorized and directed, (1) to purchase or otherwise acquire lands on each and all of the state's canals at each and every point on or adjoining such canals where surplus water passing through them might be profitably used for hydraulic purposes; (2) to sell such lands and town lots as had been acquired or might thereafter be acquired for the benefit of the canal fund and not necessary for construction of the canal,

> "other than those which are situated at points or places on or adjoining the line of the Ohio canals where the surplus water produced by said canals can be advantageously used for hydraulic purposes";

(3) to sell, in their discretion, surplus water from the canals for a term of years to the person who would bid the highest annual rent therefor; (4) in their discretion to sell for hydraulic purposes surplus water from any of the canals, and also lands not needed in connection therewith, and not necessary for navigation; this power was to be exercised by the grantees subject to such conditions and reservations as the commissioners might consider necessary and proper either *in perpetuity* or for a *limited number of years* for a certain annual rent or *otherwise* as they might deem most beneficial for the interests of the state; (5) to purchase for and on behalf of the state any mill or mill site upon any feeder to either of the canals where a valuable hydraulic power might be created, providing the creation of such hydraulic power would injure such mill or mill site; and (6) made it the duty of the canal commissioners or board of public works to make selection of such lots of land as might be necessary to the proper use of any water power which might be created by the construction of the Miami and Erie Canal or any of the sections or parts thereof.

These Acts thus conferring power to make land and water leases for hydraulic purposes and requiring the retention and acquirement of hydraulic power sites along and on each of the canals and the feeders thereof and requiring the promotion of hydraulic power wherever possible on such canals through water to be taken therefrom, making money appropriations therefor and regulating the canals by protecting the water supply, are described and the pertinent provisions will be quoted in full in the argument.

The statutes mentioned and referred to above, and

which granted power to the board of canal commissioners, afterwards the board of public works, to make sales and grant leases of lands and water,

> "*in perpetuity* or for a *limited number of years* for a certain annual rent or *otherwise*,"

and upon such conditions and reservations as the commissioners or board might consider necessary and proper, continued in force without change from the time of their enactment in 1830 and re-enactment in 1840, down to the year 1917. These statutes were carried into the Revised Statutes of 1880 as Sections 7775 to 7779, respectively, and afterwards became without change Sections 14009 to 14013 of the General Code of 1910. Section 14009 of the General Code of 1910 was amended March 21, 1917, 107 O. L. 418, limiting such leases to a period of twenty-five years' duration. This amendment, however, was enacted long after all of appellee's contracts were written, i. e., about twenty years after the earliest one, the Law lease, was written and the same length of time after navigation had been abandoned.

In the stipulation and agreement between the parties on the evidence (R. 57) it is agreed that all the legislative Acts of the States of Ohio and Indiana and the Congressional Acts, general or special in any case, as listed on Stipulation Exhibit No. 23 (R. 154) and any other special or general legislative Act or resolution pertaining to the canals of Ohio, might be considered in evidence in the court below and in any reviewing court and that quotations might be made therefrom by counsel on either side in presentation of the case in any court.

Upon the beginning of the construction of the canals in Ohio and throughout such construction the canal com-

missioners and the board of public works in pursuance of the statutory authority described above, made sales and leases of water and lands along and upon all the canals of the state for hydraulic purposes contemporaneously with the construction of the various parts thereof. (Record 5 and 65.) This practice has continued to the present time and is still in force. Such water leases and sales alone have brought to the state from the Miami and Erie Canal the sum of nine million dollars and a like amount from the Ohio Canal. (R. 65.)

(d) *Leasing of the Entire Public Works of the State:* Leasing of the entire public works of the state to private individuals was effected in pursuance of an Act passed May 8, 1861, 58 O. L. 117, entitled,

> "An Act to Provide for the Leasing of the Public Works of the State."

The public works are named in this Act as the Miami and Erie Canal, Ohio Canal, Walhonding Canal, Hocking Canal, Sandy and Beaver Canal, Muskingum Improvement and the Western Reserve and Maumee Road and all side-cuts, feeders, reservoirs, lock-houses, collectors' offices, weigh-locks and leases of surplus water connected with the same or pertaining thereto and owned by the state for the purpose of being used in connection therewith. These were leased for a period of ten (10) years to five men, and the Act provides that all moneys derived from such leasing should be paid into the treasury of the state. The public works were taken over by these lessees and operated for the period of ten years.

Section 17 of this Act provided that nothing in the Act should preclude the state from granting permission to the City of Cincinnati to enter upon and improve as a

public highway and for sewerage purposes all or any part of the Miami and Erie Canal extending from east side of Broadway in said city to Ohio River, the state reserving such right.

On April 11, 1867, 64 O. L. 330, the General Assembly through joint resolution extended this lease for another period of ten years after June 1, 1871. Two and one-half years before the end of the extension the state took the public works back into its possession, except a part of the northerly end of the Miami and Erie Canal in Toledo, and a part at the southerly end of that canal in Cincinnati. These parts in Toledo and Cincinnati were abandoned to those cities respectively, as will be presently shown. (Paragraphs 31 and 43. Appendix, pp. 219 and 248.)

(e) *Abandonment of Parts of the Canal by Legislative Act*: Abandonment of certain portions of the Miami and Erie Canal is shown through paragraphs 32 to 39, inclusive, (Appendix, pp. 221 to 236) and certain of such abandonment Acts are set out in full in those paragraphs of the Appendix.

The first abandonment Act passed March 24, 1863, 60 O. L. 44, authorized the City of Cincinnati to enter upon and occupy that part of the Miami and Erie Canal as a public highway and for sewerage purposes extending from the east side of Broadway in that city to the Ohio River. (Paragraph 32, Appendix, p. 221.)

The second abandonment Act was passed March 26, 1864, 61 O. L. 74, and authorized the City of Toledo to occupy that part of the Miami and Erie Canal as a public highway and for sewerage and water purposes extending from the southerly bank of Swan Creek (the northern

terminus of Lineal Part 1) northerly to the mouth of the Maumee River. (Paragraph 33, Appendix, p. 223.)

In Sections 44, 45, 46, 49 and 50 of Stipulation Exhibit No. 23 (R. 150) are listed other Acts of abandonment. We do not set them out in the Appendix because, except as to property affected, canals south of Columbus, they are practically the same in terms as the two abandonment Acts above described. They do not affect parts of the Miami and Erie Canal, but in Sections 47 and 48 are listed two Acts, the third and fourth, abandoning the parts of Wabash and Erie Canal (Miami and Erie Canal), westerly from Defiance, Ohio, in Paulding County to west Ohio state line. (Paragraph 34, Appendix, p. 224.)

The fifth abandonment Act, passed January 22, 1920, 108 O. L. Part 2, 1138 to 1141, is entitled:

> "An Act to abandon a portion of the Miami and Erie Canal in Lucas County and to provide for the sale or lease of the same to the City of Toledo, Ohio."

This Act abandons by appropriate description what we have designated in this brief as Lineal Part 1 and is the Act through which was effected the contract between the State of Ohio and the City of Toledo for the benefit of appellee, hereinabove referred to. It is set out in full in paragraph 35, Appendix, page 225. It is the Act construed in the case of *The Maumee Valley Electric Company vs. The City of Toledo*, 13 Federal Reporter, 2nd Series, 98 to 105.

The sixth abandonment Act was passed March 25, 1925, 111 O. L. 208 to 214. It affects that portion of the Miami and Erie Canal between the cities of Defiance

and Middletown, Ohio, and provides for leasing portions of the same to cities, villages and other political subdivisions of the state and for granting of leases outside of municipalities. (Paragraph 36, Appendix, p. 230.)

The seventh abandonment Act, passed March 27, 1925, 111 O. L. 367 to 370, is entitled:

> "An Act to Abandon a Portion of the Miami and Erie Canal in Lucas County, Ohio, and to provide for the Sale of the Same to the County Commissioners of Lucas County, Ohio."

This Act covers and affects Lineal Part 2, as we have named it, of the Miami and Erie Canal, which is the same property covered and affected by the Act attacked in this case. It is the same, practically, in its terms and provisions as the Act construed in the case of *Maumee Valley Electric Company vs. The City of Toledo, supra.* The only real difference between the two Acts is as to the property covered and that in the first Act permission was given to the City of Toledo to buy Lineal Part 1 of the Miami and Erie Canal and in this Act permission was given to Lucas County Commissioners to buy Lineal Part 2 of that Canal. This Act is quoted in full in paragraph 37, Appendix (p. 230).

The eighth abandonment Act was passed April 21, 1927, 112 O. L. 388. It abandons for canal and hydraulic purposes that portion of the Miami and Erie Canal extending from the dam north of the City of Middletown to the present southerly terminus of that canal at St. Bernard, in the City of Cincinnati. (Paragraph 38, Appendix, page 236.)

The ninth and last Abandonment Act is the one in question in this case, passed May 11, 1927, 112 O. L. 360-363, entitled:

"An Act to Abandon a Portion of the Miami and Erie Canal in Lucas County, Ohio, and to devote the same to highway and other purposes and to Repeal All Acts in Conflict Therewith."

This Act is quoted in full in paragraph 39, Appendix, (p. 236).

(f) *Abandonment of Navigation on Miami and Erie Canal*: Navigation on the Miami and Erie Canal was practically ended prior to the year 1894, and prior to the year 1900 it had entirely disappeared from all parts of that canal. It has never been revived. This is alleged in the bill of complaint and is admitted in the case. (R. 4, 5.) This canal therefore has been without navigation for practically thirty-five years because the public refused to use it for that purpose. Throughout all the time, however, from the beginning of its construction in 1825 down to the present time, over one hundred years, it has been operated by the state in furnishing hydraulic power, producing revenue to the state. (R. 64, 65).

2. Construction and Operation of Miami and Erie Canal

On March 2nd, 1827, the Congress of the United States granted to the State of Indiana (4 Statutes at Large 236) a tract of land to be sold by the State of Indiana for the purpose of aiding that state in constructing a navigable canal from the Wabash River in Indiana to Lake Erie in Ohio. (Paragraph 10, Appendix, p. 206.)

On May 24, 1828, the Congress of the United States donated to the State of Ohio (4 Statutes at Large, page 305) large tracts of land, authorizing Ohio to sell such lands and use the funds in extending the Miami Canal

from Dayton and the Mad River to Lake Erie. Thereafter the State of Indiana proposed to the State of Ohio that Indiana would transfer to Ohio that part of the lands granted by Congress to Indiana as lay within Ohio, if Ohio would build a canal from the west Ohio State Line northeasterly across northwestern Ohio to Lake Erie. The Congress consented to this transfer through an Act passed May 24, 1828 (4 Statutes at Large, 305) and on February 24, 1834, the General Assembly of Ohio by joint resolution accepted the conveyance from the State of Indiana. Appendix, Paragraphs 10 (p. 206), 12 (p. 206), 13 (p. 207), 16 (p. 209), 18 (p. 211), 19 (p. 212), 20 (p. 213).

The Miami and Erie Canal was constructed in three sections. The first section, known as Miami Canal, was authorized by the Act of February 4, 1825, Paragraph 6, Appendix (p. 200), and extended from the Ohio River northerly through Cincinnati and Dayton to the Mad River. The second section, completed in 1845, constructed from the Mad River northerly through the State of Ohio to the City of Defiance, was known as Miami Extension Canal and the construction was authorized and done in pursuance of Acts shown in Appendix, Paragraphs 14 (p. 207), 18 (p. 211), 23 (p. 214), 29 (p. 219).

The third section, completed in 1842 and known as Wabash and Erie Canal, was constructed by Ohio from the west Ohio state line northeasterly through the City of Defiance and thence on northeasterly along or in the Maumee River, as heretofore described, to and through the City of Toledo to Lake Erie. As heretofore indicated, the General Assembly on March 14, 1849, 47 Ohio Laws 44, enacted "that the Miami Canal, the Miami Extension

Canal and the Wabash and Erie Canal shall hereafter constitute one canal which shall be known and designated by the name of The Miami and Erie Canal."

That part of the Wabash and Erie Canal extending from the City of Defiance west to the west Ohio State Line was abandoned by Acts of the General Assembly April 12, 1888, 85 O. L. 207, and March 3, 1891, 88 O. L. 72, (Sections 47 and 48, Stipulation Exhibit No. 23, R. 159).

Referring to the map, Stipulation Exhibit No. 25 (R. 168), it is a true representation with respect to the location of lineal parts 1 and 2 of the canal and all other data noted thereon. At its northern terminus it ends and empties into Swan Creek, at which point is indicated on the map The Toledo Grain and Milling Company's mill. It extends southwesterly up along the Maumee River into the Village of Maumee, through Lock 45 and past the hydro-electric plant, designated Maumee Valley Electric Plant on the map; thence on southwesterly one and six-tenths (1.6) miles from said plant to the northeasterly edge of the Maumee side-cut, as shown on the map. This is the end of Lineal Part 1. Lineal Part 2 then extends on southwesterly up along the Maumee to Lock No. 9, otherwise known as Guard Lock or Lock 44. The distance from Lock 45 to Lock No. 9 or Guard Lock, is eighteen miles. There are no other locks or obstructions between Lock 9 and Lock 45 on this eighteen-mile level except bridges over the canal. Just above Lock 9 is located and indicated on the map what is known as Pilliod Mill, and about three-quarters of a mile farther up the river the canal, Lineal Part 2, connects with the river above Grand Rapids State Dam,

as shown on the map. Leading from the canal in the Village of Maumee, southerly, to the hydro-electric plant on the north bank of the Maumee River is shown the water flume through which water is drawn and carried down to the hydro-electric plant, this water at this point falling a distance of sixty feet from the surface of the canal to the water wheels in the plant. (Stipulation Exhibit No. 24, R. 163, 168). The amount of water thus supplied is four hundred and twenty-two (422) cubic feet per second, creating twenty-seven hundred (2700) horsepower. The electricity generating capacity of the plant is ten million (10,000,000) kilowatt hours per year, (Stipulation Exhibit No. 24, testimony of Dorsey and Ayers, R. 164, 168). Throughout the time from 1914 to 1924 it generated an average of approximately seven and three-quarter million kilowatt hours per year by water power, (Stipulation Exhibit No. 14, R. 131), and in the year previous to the institution of this suit it generated by water power something over nine million (9,000,000) kilowatt hours, all of which was sold to the public for heat, light and power purposes, (R. 133, and testimony of Mr. Crawford, Stipulation Exhibit No. 24, R. 162).

At the time of the construction of the part of the canal here in question in 1842, the State of Ohio as a means of furnishing water to it constructed a dam across the Maumee River at the location shown on the map, Stipulation Exhibit No. 25. (R. 168). It was reconstructed several years ago and is of reinforced concrete about one thousand (1,000) feet long across the river, twelve (12) feet high, and stores a pool of water of

about the width and depth of the dam for twenty miles up the river. (R. 3.)

All the water, 422 second feet, used in operating the hydro-electric plant at Maumee must be and is drawn from the pool in the river above the dam down through Lineal Part 2, which the Act attacked in this case seeks to abandon and close, and thence over and through the southwesterly one and six-tenth miles (1.6) of Lineal Part 1, to and through the water flume leading to the hydro-electric plant. Lineal Part 1 is the part of the canal purchased by the City of Toledo under the Act of January 22, 1920, Appendix, Paragraph 35, (p. 225). This water, therefore, passes through Lineal Part 2 owned by the State of Ohio and over the southwesterly one and six-tenths (1.6) miles of Lineal Part 1 owned by the City of Toledo, but purchased and so owned subject to the terms, provisions and conditions of the Act of January 22, 1920, as construed by the United States Circuit Court of Appeals for the Sixth Circuit, in *Maumee Valley Electric Company vs. Toledo*, 13 Federal, 2nd Series, 98 to 105.

The Act attacked in this case was passed May 11, 1927 (Appendix, Paragraph 39, p. 236), declaring an abandonment of Lineal Part 2 and attempting to repeal all acts in conflict therewith and to declare all water contracts null and void, including of course those of appellee. Prior to that, however, and on March 27, 1925, the General Assembly had passed an Act (Appendix, Paragraph 37, p. 230), also declaring an abandonment of said Lineal Part 2, and to provivde for the sale thereof to the County Commissioners of Lucas County, Ohio. This Act gave an option to the County Commissioners of

Lucas County to buy Lineal Part 2 but provided that if the County Commissioners should elect to buy they should take it and it would be conveyed through a deed from the state to such commissioners,

> "but excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, including the rights of said owners to a renewal of their said existing leases and subject to all lawful claims for damages and compensation asserted by such lessees on account of the abandonment of said canal under the provisions of this Act, including claims of lessees who are now receiving water at points situate on that part of said canal" (Lineal Part 1) "which has heretofore been sold and conveyed to the City of Toledo under and pursuant to the provisions of House Bill No. 560 enacted by the General Assembly of Ohio on the 22nd day of January, 1920,"

this last mentioned Act in the quotation being the one under which Toledo bought Lineal Part 1 as described above (Appendix, Paragraph 35, page 225).

The Act providing for the sale of Lineal Part 2 to the Lucas County Commissioners provided that the Commissioners should pay a price therefor in cash to be thereafter determined by a board of appraisers appointed by the governor, and the Act required such appraisers in appraising it "to take into consideration in said appraisement the revenue that can be derived from the use of said canal for any purpose." It was appraised by such a board at seven hundred and seventy-five thousand dollars (R. 20). This Act, like the Act of January 22, 1920, under which Toledo bought Lineal Part 1, provided that if the county commissioners should ever take the water out of Lineal Part 2 they should pay all the state's lessees for all the water they were entitled to

under their existing leases on both Lineal Parts 1 and 2, and that a deed should not be made to the State of Ohio until such payment should be made. It also prescribes the procedure under which the price should be arrived at to be paid to the lessees.

The commissioners of Lucas County never exercised the option given them under the Act of March 27, 1925 (Appendix, Paragraph 37, page 230), to purchase Lineal Part 2 of the canal, and the Act in question and attacked in this case attempts in its Section 13 to repeal said Act of March 27, 1925. (Appendix, Paragraph 39, page 236.)

3. Appellee's Leases, Agreements and Grants

Appellee is the owner of the following seven contracts, some of them leasing to appellee certain canal lands, and each of them reserving, selling or leasing water to be taken through, over and from the parts of the canal in question here in the manner and for the uses already described: (Stipulation Exhibits Nos. 1 to 7, inclusive, R. 68 to 101.)

(a) *The Law, Trustee, Lease*: The Law lease (Stipulation Exhibit No. 1, R. 68) was acquired by appellee on September 11, 1900, through assignment thereof with consent of the board of public works, from Robert J. Law, trustee, original lessee in the lease and to whom it was made on March 12, 1895, running in its preliminary term for a period of thirty (30) years from and after that date. By the resolution of the board of public works giving its consent to the assignment of this lease to appellee it also gave consent to appellee to sublet any

of the rights and privileges secured by the lease to appellee. By its terms it grants

> "the use and occupation of all the surplus water of the Miami and Erie Canal between Providence and Toledo not needed for navigation or not now under lease,"

such water to be taken out of the level of said canal at Maumee (this is on Lineal Part 1) and be conveyed to the hydraulic works to be constructed by and at the expense of the lessee. This lease provides that the lessee should pay a yearly rent of five hundred dollars ($500.00) to Ohio for the water, the rent to be paid semi-annually on the first days of May and November each year during continuance of the lease. It requires lessee to build at his own expense the regulating weir of stone walls and plates of wood under plans to be furnished by the acting state commissioner or engineer; requires the lessee to keep such regulating weir constantly in good repair, free from all obstructions; requires the lessee to construct the head-race, tail-race and other works and devices connected with the use of the water thus leased. The lessee is designated second party to the agreement and the lease further provides as follows:

> "And the said party of the second part further agrees, during the continuance of this lease, to keep constantly in good order and repair the weir, head and tail-race, and *all other works and devices connected with the use of the water hereby leased*, so far as the same shall be necessary to secure the regular and uniform flow of water from the upper to the lower levels, and also to prevent any breach in the bank, the formation of a bar or other injury to the canal, or impediment to the navigation thereof; and if, nevertheless, any such breach, bar, or other injury or impediment should

occur in consequence of any of said works not being faithfully and substantially constructed, or being suffered to be out of repair, then said party of the second part shall, on being notified thereof by said acting commissioner, engineer, or other proper agent of the state, immediately repair said breach or other injury; or if such agent of the state shall cause the same to be done (which he is hereby authorized at his option to do), then said party of the second part shall pay to said agent all necessary expenses incurred in repairing such breach or other injury, on demand."

This lease has a reservation in the following words:

"And the party of the first part reserves the right to resume, at any time, the use of the water hereby leased, whenever the same shall become necessary for the *purposes* of *navigation*, and to continue the use thereof so long as the same shall be necessary for the *purpose aforesaid;* and if it shall become necessary for the party of the first part to resume the use of so great a portion of the water hereby leased, or of the whole thereof for so great a portion of the time as to defeat the object of this lease, by destroying the value of the privilege (which fact shall be determined by three judicious, disinterested freeholders, one to be chosen by the acting commissioner, or other authorized agent of the state, one by the party of the second part, and the third by the two thus chosen), then the party of the second part shall be from such time absolved from all further liabilities growing out of this agreement."

It also contains an express provision for its renewal in the following words:

"And it is further understood and agreed, that at the expiration of this agreement the party of the second part shall be entitled to a renewal of the lease, for a like term of years, for such an-

nual rent as may be offered by the highest responsible bidder, who shall also agree to purchase of said party of the second part, all permanent and valuable buildings necessarily erected by said party for the convenient use of the water power hereby leased, at such price as such buildings shall be adjudged to be worth by three judicious, disinterested freeholders, to be chosen as hereinbefore specified; provided, such buildings shall be erected on land belonging to the state, or land which can be purchased by said bidder at a reasonable price, to be determined by said appraisers. And if no such bid shall be made on the terms aforesaid at a higher rent than is herein specified, said party shall be entitled to such renewal on the terms of this lease."

Upon the same conditions and subject to the same limitations and restrictions contained in the lease the state leased to the lessee, for the purposes of enabling him to use said water power, a piece of land lying between the canal and the hydro-electric plant in Maumee through which extends the water flume hereinabove mentioned.

The lease contains provisions providing for forfeiture if in any case the lessee should not perform the obligations put upon him by the terms thereof.

Upon the acquirement of this lease appellee acquired the land where the hydro-electric plant shown on Stipulation Exhibit No. 25 (R. 168) in Maumee is located and there constructed a small hydro-electric plant of about four hundred hydraulic horsepower. (Testimony, Mr. Crawford, Stipulation Exhibit No. 24, R. 161.)

On April 9, 1902, the General Assembly passed an Act declaring it to be the settled policy of the state that

the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands, from Cincinnati to Toledo, should be retained and maintained as a public canal, and the same policy was declared as to the northern division of the Ohio Canal from Cleveland to Dresden on the Muskingum River. (Appendix, Paragraph 42, page 246.) Section 2 of this Act declared that all boats built for use upon either of the above mentioned lines of canal for freight transportation should be paid for by the state if at any time in the future the state should abandon either or both of said lines, so as to make such boats useless for transportation purposes.

Section 3 declared that the water supplies, reservoirs, dams, feeders and adjacent lands thereto of the southern division of the Ohio Canal from Dresden Junction to Lockbourne and from Columbus to Portsmouth should be retained and maintained. The southern division of the Ohio Canal included the Hocking Canal lying between the canal running from Columbus to Portsmouth on the west and the Muskingum River on the east. These canals were connected as a system. Section 3 also provided that a commission to be appointed by the governor should investigate the condition of the southern division of the Ohio Canal and report its findings bearing on the question of the improvement and maintenance of that division and its future usefulness as a canal, and it provided that pending such report the southern division should be kept open for navigation.

Section 4 of this Act provides as follows:

> "Section 4. The said board of commissioners, together with the board of public works, shall within the present year investigate all present water rate contracts on the two lines of canal

mentioned in Section 1 and revise and readjust them upon a fair and equitable basis as to the rents to be paid in the future.

The board of commissioners and the board of public works shall also investigate the water rent contracts upon the lines of the canal mentioned in Section 3 and make a special report to the next General Assembly as to what extent the rates for water rent may be increased."

(b) *The Tryon Lease, Stipulation Exhibit No. 4* (R. 82):

After the passage of the above mentioned Act of 1902, appellee acquired the Tryon lease in 1904 through assignment from the original lessee and with consent of the board of public works. This lease will be hereafter more particularly described.

(c) *James Purdy Quit-claim Grant, Stipulation Exhibit No. 7* (R. 101), *and Section 4 of the Stipulation and Agreement on the Evidence* (R. 60):

Under this grant James Purdy on December 8, 1845, for the consideration set forth in the grant, released and quit-claimed to the State of Ohio his right and interest as riparian proprietor to the use of water in the Maumee River flowing over the "Grand Rapids" alongside of his property in and near the Town of Gilead, now Grand Rapids Village, in Wood County on the south side of the Maumee River, that is, so much of such water as the state might

> "choose to divert and lease for *hydraulic purposes*, provided that the said Purdy reserves and excepts from said conveyance and reserves to his own use so much of such water to be taken from the pool of the dam aforesaid through the canal

> herein described in any quantity he may desire during the season that the canal is not navigable until the water in the pool sinks to a level fifteen inches below the top of the dam at its present height in the north channel"

of the river, said water so reserved being sufficient to operate six pairs of 4½-foot mill stones, grinding each at the rate of 150 bushels of wheat per twenty-four hours, together with all machinery necessary in manufacturing flour, etc. The rights reserved and excepted by Purdy as shown by other parts of the grant, were reserved and excepted to himself and by the state granted to him and his heirs and assigns forever, and on April 27, 1910, appellee became the owner of the rights thus reserved and excepted under this grant. (R. 60.) Purdy had built a mill on the south side of the Maumee River at Grand Rapids, formerly Gilead, and had built his own mill race carrying water from the river above his dam down to his mill on the south bank of the river. This grant was executed between Purdy and the state in pursuance of a resolution passed by the General Assembly of Ohio on March 12, 1845, and specifically authorizing such settlement with him. (Appendix, Paragraph 40, page 241.)

Statement as to this quit-claim grant was by mistake omitted from the bill of complaint, and by Section 4 of the Stipulation and Agreement on the Evidence between the parties (R. 60) it was agreed that the facts set forth in Section 4 should be considered as a part of the bill of complaint without amending the same, and by Section 15 of the Stipulation and Agreement on the Evidence (R. 64) it is agreed that no water reserved by this grant has been taken out of the pool of the Maumee

River on the south side of that river from above Grand Rapids dam since appellee acquired the grant, but that all such reserved water has been and is being taken from the pool by appellee out of the river on the north side and carried through the canal to the hydro-electric plant in Maumee.

(d) *Agreement and Supplemental Lease:* In the month of December, 1910, in pursuance of the Act of 1830 and of Section 4 quoted above of the Act of 1902, the State of Ohio, through its board of public works, and appellee entered into an agreement supplemental to and modifying the Law lease (Stipulation Exhibit No. 2, R. 74). This agreement in its preamble recognizes the ownership by appellee of the Law lease; also that the service rendered under the terms of the Law lease was unsatisfactory and that the compensation named in the Law lease was inadequate for satisfactory service; that to increase the flow of water in the canal between Grand Rapids and the hydro-electric plant in Maumee, appellee had undertaken at its own expense to remove rock bars in the canal near Waterville and remove other obstructions from the canal on the eighteen-mile level between Grand Rapids and Lock 45, and to raise the banks of said canal in certain places; that appellee was willing to pay the expense of a proper patrol system from the Village of Grand Rapids to Lock 45 to prevent breaks in the banks, repair locks, remove logs, brush and other impediments to the free and even flow of the water; that appellee was willing to pay an increased rental for the use of water granted by the terms of the Law lease, provided a high water level should be maintained in said portion of the

canal. It is then mutually agreed between the state and the appellee that:

> "First, the state should let into the eighteen-mile level of the canal at Grand Rapids from the pool above waters of the Maumee River equal to the safe capacity of said canal for use for hydraulic purposes at the mill of appellee located near Maumee and to cause as large, steady and even flow of such waters as may be practicable.
>
> Second, that the state should require the superintendent of canals to appoint three patrolmen who should be paid for their services by appellee and who should be required to patrol the canal banks between Grand Rapids and Lock 45, to repair breaks in the canal banks, stop leaks, remove logs, brush and other impediments.
>
> Third, that the state 'does sell and lease unto the company all of the increased water passing over the weir of said company provided for by this agreement.'
>
> Fourth, that the company appellee agrees to maintain its weir at all times at the level at which the same is constructed or on the order of the board of public works at such level as said board might thereafter require.
>
> Fifth, the company agreed to complete the excavation of the rock bars in the canal near Waterville as well as remove all other obstructions on the eighteen-mile level and to raise the banks thereof with all possible diligence at its own proper expense.
>
> Sixth, the company agreed to pay the compensation of the three patrolmen to be appointed by the state.
>
> Seventh, the company agreed to pay the State of Ohio the sum of $1500.00 per year in addition to the $500.00 provided for in the Law lease, and to pay an additional $1500.00, making $3500.00 in all in case the amount of water specified in the 7th section should be furnished.

> Eighth, all payments except premium payments for uninterrupted service were to be made subject to all provisions specified in the Law lease.
>
> Ninth, the agreement was to continue until March 12, 1925, end of the preliminary term of the Law lease, unless sooner terminated by default on the part of the company, and it was provided that a cancellation of the Law lease should work a cancellation of all obligations under this supplementary agreement."

After the acquirement by appellee of the Law lease, the Tryon lease and the Purdy grant by assignment from the original owners thereof respectively, and after appellee had entered into the supplementary agreement direct with the State of Ohio, it immediately complied with the requirement of the supplementary agreement for improvement of the canal by appellee, and therein deepened and widened the canal from Grand Rapids to Lock 45, raised the banks, removed the rock bars, and in fact did all that the supplementary agreement required of it to do in improving this property. Appellee did this at its own expense and at a cost of $53,000.00. (Testimony, Mr. Crawford, Stipulation Exhibit No. 24, R. 160.)

(e) *The Studer, Maumee Paper Company and Detwiler Leases*: Thereafter appellee acquired the Studer lease on December 11, 1913, Stipulation Exhibit No. 3 (R. 77), the Maumee Paper Company lease, Stipulation Exhibit No. 5 (R. 88), the George K. Detwiler lease, Stipulation Exhibit No. 6 (R. 95), all with the consent of the state, and since then appellee has been operating all of said contracts as alleged in the bill of complaint in operating the hydro-electric plant at Maumee, gen-

erating electricity sold to the public for heat, light and power purposes. (Sections 4 and 5, Stipulation and Agreement on the Evidence, R. 60, 61.)

By Sections 4 and 5 of the Stipulation and Agreement on the Evidence it is agreed that throughout the time from the acquirement by appellee of each of said contracts, Stipulation Exhibits Nos. 1 to 7, inclusive, to the present time, appellee has paid all the rentals called for by said contracts and has performed each and all the obligations provided for in each of them for it to do and perform, including payment of rentals on the Law lease, Stipulation Exhibit No. 1, and the supplemental agreement, Stipulation Exhibit No. 2. The preliminary term of the Law lease and the supplementary agreement expired March 12, 1925, but the United States Circuit Court of Appeals in *Maumee Valley Electric Company vs. Toledo*, 13 Federal, 2nd Series, 98 to 105, held that each of these two leases were renewed for another period of thirty years under their terms and under the action appellee had taken to renew them. (Stipulation Exhibits Nos. 19, 20, 21, 22, R. 140 to 152.) The rentals called for under these leases have been paid by appellee and accepted by the state on the new term of thirty years since its beginning on March 12, 1925.

Contemporaneously with the performance by appellee of the work of improving the canal, i. e., the state's property, under the supplementary agreement at a cost of $53,000.00 appellee reconstructed and greatly enlarged the hydro-electric plant at Maumee, from its capacity of four hundred horsepower to twenty-seven hundred horsepower, enlarging the water flume leading from the canal southeasterly to the plant, including the neces-

sary iron pipe flumes under the River Road, running down to the plant with a fall of sixty-one feet, put in an auxiliary steam plant and an entirely new and greatly enlarged system of turbine water wheels and electric generators, thus bringing the water plant to an electricity generating capacity of ten million kilowatt hours per year, Stipulation Exhibit No. 24. (Testimony, Messrs. Crawford, Dorsey and Ayers, R. 160 to 169.)

The terms and conditions of the leases, Stipulation Exhibits Nos. 3 to 6, inclusive, are the same as the terms and conditions, as to provisions for maintenance of the canal, reservations and renewal rights, of the Law lease, Stipulation Exhibit No. 1, except as shown by the following:

"STIPULATION EXHIBIT No. 3

Thomas W. Studer Lease

This lease was entered into November 13, 1906, between State of Ohio, first party, by the board of public works, and Thomas W. Studer, lessee, second party.

The provisions, terms and conditions if this lease are the same as set forth above in the Law Trustee lease, except,

(a) It sells and leases to lessee for the term of thirty years from and after November 1, 1906, 2100 cubic feet of water per minute, estimated at 47 horsepower, to be used in a grist mill or electric power plant, or other machinery which may be approved by board of public works, said water to be taken out of the level of the Miami and Erie Canal, Waterville, Ohio, and be conveyed to the mills or other hydraulic works over a regulating weir constructed by and at expense of lessee.

(b) Lessee is to pay to state the yearly rent or sum of Four Hundred Fifty Dollars ($450.00), payable semi-annually on the first day of May and November of each year.

(c) This lease reserved to board of public works the right at any time to enter upon the premises leased to construct and put in a gauge for the purpose of measuring water leased in such manner and place as may be deemed advisable, but at the expense of lessee.

(d) This lease does not lease any land to lessee.

This lease, with consent of the state by resolution of its board of public works, was duly assigned and transferred to the plaintiff, The Maumee Valley Electric Company, on December 11, 1913."

"STIPULATION EXHIBIT No. 4
A. C. Tryon Lease

This lease was entered into April 8, 1903, between State of Ohio, first party, by its board of public works, and A. C. Tryon, lessee, second party.

The provisions, terms and conditions of this lease are the same as set forth above in the Law Trustee lease, except,

(a) It sells and leases to lessee for thirty years from and after May 1, 1903, the use and occupation of a water power in Maumee, Ohio, said privilege to consist in the use of the water to which Reynolds and Brown were entitled at their mill, the quantity being 2,050 cubic feet per minute, estimated at 58 horsepower, and said water to be used after passing the mill of Mitchell and Brown and the mill of The South Toledo Paper Company, and will be used at the third fall on the same race, and to be taken out of the level of said Miami and Erie Canal in Maumee, Ohio, and be conveyed to the mills or other hydraulic works over a regulating weir constructed by and at expense of lessee.

(b) Lessee agrees to pay the state a yearly rent or sum of Three Hundred Dollars ($300.00)

in advance in semi-annual installments on the first day of May and November of each year.

(c) This lease leases to lessee for the like period of thirty years under the terms and conditions of the lease, the same as for the water 'all the state land abutting the powers hereby leased and not included in the lease to the paper mill and below it on the side-cut in Maumee, Ohio, which belongs to the state, and lessee agrees to furnish at his own expense all further and necessary land that may be required for use of the power hereby leased, to enable lessee to use and enjoy the use of the water power hereby leased for the like term of thirty years from May 1, 1903.'

(d) This lease gives the board of public works the right to enter upon the premises leased to construct and put in a gauge to measure the water leased in such manner and place as the board may deem advisable, but at the expense of the lessee.

This lease, with consent of the state by resolution of its board of public works, was assigned and transferred to the plaintiff, The Maumee Valley Electric Company, on October 13, 1904."

"STIPULATION EXHIBIT No. 5
The Maumee Paper Company Lease

This lease was entered into April 8, 1903, between the State of Ohio, first party, by its board of public works, and The Maumee Paper Company, second party, lessee.

The provisions, terms and conditions of this lease are the same as those set forth above in the Law Trustee lease, except,

(a) It sells and leases to the lessee for the term of thirty years from and after May 1, 1903, the use and occupation of a water power in South Toledo to consist in the use of the water to which the mill next above is entitled, being 2050 cubic feet per minute, estimated at 52 horsepower, and be used after passing the mill above, and being the

second fall from the Miami and Erie Canal in South Toledo (Maumee) by way of the next mill above summit and be conveyed to the mills or other hydraulic works.

(b) Lessee, for the right of such use and occupation of such water, shall pay the state the yearly rent or sum of Four Hundred Dollars ($400.00) in advance, payable in semi-annual installments on the first day of May and November in each year.

(c) 'That said water will at all times return into the canal after being used for hydraulic purposes at some convenient and proper place to be designated thereafter by said board of public works, engineer or other authorized agent of the state on the level next below Lock No. . ., in such manner as not to carry deposit into the canal nor obstruct the navigation thereof.'

(d) This lease leases to the lessee 'for the term of thirty years from the first day of May, 1903, all the land adjoining and abutting the power hereby leased, and included in the lease to Stadden and Company and below them and on South Toledo side-cut, which belongs to the state, and lessee agrees to furnish at its own expense all further and necessary land that may be required for use of the power hereby leased to enable lessee to use and enjoy the water power hereby leased for the like term of thirty years from May 1, 1903.'

(e) This lease reserves to board of public works the right to construct and put in a gauge of such size as will measure the water leased in such place and manner as said board may deem advisable, but at the expense of lessee.

This lease, by consent of the board of public works by resolution of that board, was assigned and transferred to plaintiff, The Maumee Valley Electric Company, in the year 1912."

"STIPULATION EXHIBIT No. 6
George K. Detwiler Lease

This lease was entered into February 20, 1901, between State of Ohio, first party, by Frank A. Huffman, acting commissioner of board of public works, and George K. Detwiler, second party, lessee.

The provisions, terms and conditions of this lease are the same as those set forth above in the Law Trustee lease, except,

(a) It sells and leases to lessee for the term of thirty years from and after May 1, 1901, the use and occupation of such quantity of water, if used at the location of the water power formerly occupied by Robert A. Forsythe and later by Raynor Seagraves and Company, as will produce 40 horsepower, which quantity of water is estimated to be 833 cubic feet per minute over a fall of thirty-two feet, the water hereby leased to be taken out of the level of the Miami and Erie Canal next above the Miami Lock (Lock No. 45). At the above named location, or such other point as may be agreed upon by the parties herein named, or their assigns, and to be conveyed to the mills or hydraulic works from between two regulating weirs to be constructed by and at the expense of lessee.

(b) For the right to use and occupy said water, lessee is to pay the state the yearly rent or sum of Three Hundred Twenty Dollars ($320.00) in advance on the first day of May and November in each year.

(c) This lease does not grant to lessee a lease of any land, but requires lessee to furnish his own land on which to use the water leased as aforesaid without any claim for deduction of rent therefor to enable lessee to use and enjoy the water power leased for the like term of thirty years from May 1, 1901.

This lease was assigned to The Maumee Valley Electric Company on September 20, 1909, and

such assignment was approved by Frank P. Hamer, superintendent of public works of Ohio, on January 25, 1916."

When the above described contracts had been acquired by appellee, it then owned all of such contracts permitting the taking of water from the part of the Miami and Erie Canal in question here, on both Lineal Parts 1 and 2, excepting the Peter Minor contract, shown by Stipulation Exhibits 8 and 9 (R. 104 and 110), and The Toledo Grain & Milling Company lease, Stipulation Exhibit 10 (R. 116). The Peter Minor contract is a perpetual grant under which the Providence Mill Company operates the Pilliod mill at Providence, Lineal Part 2, just below the Grand Rapids State Dam, as shown on Stipulation Exhibit No. 25, map of the canal. The Toledo Grain & Milling Company lease is the lease under which that company takes water from the north end of Lineal Part 1 for the operation of its mill there located, as shown on Stipulation Exhibit No. 25 (R. 169). The Peter Minor contract was made September 1st, 1842, and it was readjusted in 1846. The Toledo Grain & Milling Company lease is a renewal of a lease which was granted prior to the execution and delivery of appellee's Law lease, Stipulation Exhibit No. 1 (R. 68).

Appellee's lease known as the Detwiler lease, Stipulation Exhibit No. 6, is a renewal of a lease granted prior to the granting of the Law lease. The Law lease, Stipulation Exhibit No. 1, sold and leased to Robert J. Law, Trustee, for the term of thirty (30) years from and after the 12th day of March, 1895, subject to the restrictions, limitations and conditions therein contained, the *use* and *occupation* of all the water of the Miami and Erie Canal

between Providence and Toledo not needed for navigation or not now *under lease*. From the reading of the Studer lease, Stipulation Exhibit No. 3, the Tryon lease, Stipulation Exhibit No. 4, the Maumee Paper Company lease, Stipulation Exhibit No. 5, it appears that there were other leases on this part of the canal in existence at the time the Law lease was taken and that these three leases last mentioned above succeeded those leases.

II

SUMMARY

A. POINTS OF FACT

1. Federal Jurisdiction

Federal jurisdiction in the court below has not been disputed in this case, but from the facts stated above and the statement of facts hereinafter set out in the successive "Points of Fact" under this summary, all of which are shown by the bill of complaint, the jurisdiction in the court below clearly appears.

2. Authority for and Purposes of Construction and Operation of Miami and Erie Canal

Ohio's public canals, including the Miami and Erie Canal, which was a canal not connected with the others, and the particular part thereof in question in this case, shown by Stipulation Exhibit No. 25, map (R. 169), were constructed under the first Constitution of Ohio, 1802, and in pursuance of enabling Acts passed by the General Assembly of the state under that Constitution, and they,

including the Miami and Erie Canal and the part thereof in question here, were constructed for two purposes, *viz.*, public navigation and the furnishing of lands and water to private parties to be used for hydraulic power and other industrial and commercial purposes.

3. Navigation Abandoned on Miami and Erie Canal

It is alleged in the bill of complaint, Section 3 (R. 4, 5), that navigation on the Miami and Erie Canal had practically disappeared prior to the year 1894; that thereafter and before the year 1900 navigation had entirely ceased because of the failure and refusal of the public to use the canal for such purpose and that navigation has not since been revived. This allegation is admitted in the answer of the state highway director, Section 3 (R. 30).

The construction of the Miami and Erie Canal was completed in the year 1845 (R. 4, 30). The decline of navigation began prior to the year 1861.

4. When Appellee's Water and Land Contracts Written and Acquired

All of appellee's contracts, except the James Purdy grant (Stipulation Exhibit 7, R. 101), were written and all of them were acquired after navigation on the Miami and Erie Canal, including the part in question here, referred to as Lineal Parts 1 and 2, had been abandoned by reason of the refusal of the public longer to use that waterway for the purpose of navigation. The Purdy grant was written on December 8, 1845, and through it he quit-claimed to Ohio for hydraulic purposes the right

to take such water as he was entitled to take from the south side of the Maumee River at Gilead, now Grand Rapids, Wood County, Ohio, by reason of his riparian ownership on the river there, he reserving and excepting, however, therefrom to himself, his heirs and assigns forever, the amount of water specifically described in the grant. Appellee is the owner of the rights thus reserved and excepted by Purdy to himself, his heirs and assigns. (R. 60.)

5. Facts Upon Which Appellee Relied and Acted in Acquiring Its Contracts, Building Its Plant, and Its Business.

Appellee and the State of Ohio through the supplementary lease devised and perfected a plan under which all of the lands, including Lineal Part 2 and Lineal Part 1 to Lock 45, and the water, the use of which is called for by appellee's seven contracts, were and are to be devoted to the establishment and use of a great water power at Maumee, Ohio, all the water thus called for, four hundred and twenty-two second feet, to be drawn from the pool of the river above the State Dam at Providence down, over and through Lineal Part 2 and the southwesterly one and six-tenths miles of Lineal Part 1 of the Miami and Erie Canal, as a right of way, to the hydro-electric plant, and to be there used in operating that plant, generating electricity for light, heat and power. From the facts above and hereinafter stated no other inference can be drawn.

Appellee in acquiring said contracts and working out said plan relied,

(a) On the fact that navigation on the Miami and Erie Canal had been practically ended prior to the year 1894, thirty-five years ago, and was entirely gone before it acquired its principal lease, the Law lease, with express consent and permission from the State of Ohio, on September 11, 1900, that lease having been written on March 12, 1895, for a period of thirty (30) years thereafter, and having written in it an absolute right of renewal for another thirty (30) years if appellee should pay such a price as any other person might bid for it. If no such other bid should be received then this lease by its terms was to stand renewed in appellee on the terms thereof as originally written. (Stipulation Exhibit No. 1, R. 72.)

(b) On the statute passed February 11, 1828 (Appendix, Paragraph 11, page 206), expressly giving the board of public works power to sell from any canal for a term of years, in their discretion, water not needed for navigation, such sale to be to the person who would bid the highest annual rent therefor.

(c) On the statutes of February 18, 1830, Sections 3 to 7 (Appendix, Paragraph 15, page 208), re-enacted as the statute of March 23, 1840, Sections 20 to 24, inclusive (Paragraph 27, Appendix, page 215), by which statutes the canal commissioners and board of public works were given power to sell or lease water from any of the canals, and the lands along the same, for hydraulic purposes if such waters or lands were not needed for navigation, this power being given to such boards to be exercised by the lessee or grantee subject to such conditions and reservations as the board might consider necessary and proper, either in *perpetuity* or for a limited *number*

of years for a certain annual rent *or otherwise* as the board might deem most beneficial for the interests of the state, such statutes standing unchanged to the year 1917 and then amended only by limiting the leasing term to twenty-five years.

(d) The constant and continued practice of the canal commissioners and the board of public works in accepting such grants and other contracts relative to lands and waters along and from each of the canals wherever water power could be developed, from the beginning of the construction of such canals in any and all their respective parts (Stipulation and Agreement of the Evidence, Section 16, R. 65) down to the consummation of the plan above described.

(e) Particularly the Act of April 9, 1902, 95 O. L. 118-120 (Appendix, Paragraph 42, page 246). This Act in Section 1 declared it to be the policy of the state that the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo, should be retained and maintained as a public canal and the same policy was declared as to the northern division of the Ohio Canal.

Section 3 of this Act, among other things, provided that a commission, to be appointed by the governor, should investigate the condition of the southern division of the Ohio Canal, being the Muskingum River improvement end, and from Dresden Junction to Lockbourne and from Columbus south to Portsmouth on Ohio River, obtain all the facts bearing upon the question of its improvement, maintenance and its present and future usefulness as a canal and report the same, together with recommendations, to the next General Assembly, pend-

ing which report this division (which included the Hocking Canal) should be kept open for navigation.

Section 4 of this Act expressly authorized and directed the canal commissioners and the board of public works to

> "investigate all present water rate contracts on the two lines of canal mentioned in Section 1 and *revise and readjust* them upon a *fair* and *equitable basis* as to the rents *to be paid* in the *future*."

The two lines of canal mentioned in said Section 1 were the Miami and Erie Canal, and the northern division of the Ohio Canal from Cleveland *to* Dresden on the Muskingum River. This Section 4 also directed the commissioners and board of public works to investigate the water rent contracts upon the lines of the canal mentioned in Section 3 and make a special *report* to the next General Assembly as to what extent rates for water rent might be increased. As showing that appellee relied upon the above facts, see Stipulation Exhibit No. 24, testimony of Mr. Crawford, president of appellee (R. 161).

6. What Appellee Has Done Relying on the Above Facts

(a) Relying upon the above facts appellee, upon acquiring the Law lease, September 11, 1900, acquired a valuable piece of land on the banks of the Maumee River at Maumee and constructed thereon a hydro-electric plant of four hundred horsepower, this being the location of the plant at the present time as shown on Stipulation Exhibit No. 25, Map (R. 63, 161).

(b) After the passage of the Act of April 9, 1902, appellee acquired, with the consent of the state, the Purdy grant and all the contracts for water and land on

Lineal Parts 1 and 2, except the grant under which the Pilliod mill is operated and the lease under which The Toledo Grain & Milling Company mill is operated, the contracts so acquired being Stipulation Exhibits Nos. 3 to 7, inclusive (R. 9 to 12 and 161).

(c) In December of 1910, in pursuance of said statutes and particularly the Act of 1902 (R. 161), appellee and the state, through the board of public works, entered into the agreement supplementary to and modifying the Law lease, Stipulation Exhibit No. 2 (R. 74).

Under the Law lease the original lessee, and afterwards appellee, as assignee thereof, became obligated to bear at its own expense all the cost of the maintenance of this canal from where it connects with the Maumee River above the Grand Rapids Dam to Toledo, including all works and devices connected therewith, which of course includes the Grand Rapids Dam (R. 70, 71). The same provisions with respect to the maintenance of the canal at the expense of appellee are contained in each of the other contracts acquired by appellee through assignment as aforesaid, except the Purdy grant.

Under the agreement supplementary to the Law lease made direct between the state and appellee, appellee assumed the obligation of complete maintenance of the canal from its connection with the Maumee River northeasterly to Lock 45, three-quarters of a mile northeasterly from the hyro-electric plant. In this agreement appellee also assumes the obligation of paying the wages of three patrolmen to be appointed by the state for the purpose of patrolling this canal, to prevent and to repair breaches in the banks of the canal, and to do any other matter or thing necessary to keep the canal in

good repair. In addition to the above appellee assumed in this supplementary lease an obligation to deepen and widen the canal, through excavation, permanently improve the state's property, from the Maumee River to Lock 45, remove all rock bars and other obstructions throughout the same and to raise the banks thereof. Appellee immediately complied with this provision, dredged the canal, deepening it and widening it and raising the banks thereof at a cost to appellee for this work alone of ($53,000.00) fifty-three thousand dollars. (Testimony of Crawford, R. 161.) In addition to the above appellee in this agreement agreed to pay and has paid a largely increased rental, namely, fifteen hundred dollars per year in addition to the five hundred dollars called for by the Law lease, and agreed to pay a further sum of fifteen hundred dollars per year if water should be supplied by the state through the canal to the additional amount stipulated in the supplementary agreement.

Aside from all of the above it assumed the payment and has paid all the rentals called for by the Tryon, Studer, Maumee Paper Company and Detwiler leases, Stipulation Exhibits 3 to 6 (R. 77 to 88).

(d) Upon acquirement by appellee of the supplementary agreement in December, 1910, appellee increased the capacity of the water flume leading from Lineal Part 1 of the canal in Maumee easterly to the River Road above the hydro-electric plant, from a small headrace accommodating the initial power plant of 400 horsepower to a great flume about 400 feet long, 50 feet across the top, 40 feet across the bottom, and 12 feet deep, and put in place from the west side of the River Road three large iron tube flumes to carry the water under the River

Road down to the water wheels at the plant, a fall of 61 feet. Appellee also at that time greatly enlarged the plant by installing new and modern water turbine wheels, electricity generators and an auxiliary steam plant to assist the water plant through possible dry seasons of the year. The water or hydraulic part of this plant was increased from its former capacity of 400 horsepower to 2700 horsepower capable of generating (10,000,000) ten million kilowatt hours of electricity per year. Stipulation Exhibit 24, testimony of Crawford, Dorsey and Ayers (R. 63 and 161 to 168).

7. Renewal of the Law Lease and the Supplementary Lease

The Law lease was granted for a period of thirty years beginning March 12, 1895, and running to March 12, 1925 (R. 68). The supplementary agreement was given in December, 1910, to run contemporaneously with the Law lease (R. 74). The Law lease contains a provision for its renewal for a second period of thirty years beginning March 12, 1925 (R. 72).

This renewal clause provides that the lease should stand renewed in appellee for such second period if appellee would pay any additional rent that any other party might bid therefor and that if no such bid should be received then said lease should stand renewed in appellee on its present terms. No such bid was received.

This same renewal clause is contained in each of the leases, Studer, Tryon, Maumee Paper Company and Detwiler (R. 80, 86, 92, 99). Neither of these four last mentioned leases has expired in its primary term. Such ex-

pirations *will occur one in* 1931, *two in* 1933 and one in 1936. The Purdy grant is a perpetual grant.

On August 7, 1924, previous to expiration of the primary term of the Law lease, appellee made application for renewal of all the above mentioned leases and agreements except the Purdy grant, Stipulation Exhibit No. 19 (R. 140), and took the other proceedings as shown by Stipulation Exhibits Nos. 20 to 22, inclusive (R. 141 to 154).

It is alleged in the bill of complaint, admitted in the answer and agreed in the Stipulation and Agreement on the Evidence (R. 12 and 61) that appellee has performed all the obligations of its contracts put upon it by the terms thereof and that it has paid to the state and the state has accepted such performance from appellee, including payment of all the rentals called for by the Law lease and the supplementary agreement, since the beginning of the renewal period of thirty years now running. The Law lease and the supplementary lease stand renewed for thirty years beginning March 12, 1925.

8. The State Entered Into a Contract With Toledo for Benefit of Appellee

In pursuance of the Act passed January 22, 1920 (Appendix, Paragraph 35, page 225), the City of Toledo purchased Lineal Part 1 of the canal and in that transaction the State of Ohio and Toledo entered into a contract for the use and benefit of appellee providing and stipulating that Toledo should not take the water out of Lineal Part 1, on which the hydro-electric plant is located, nor in any way deprive appellee of the use of

the water called for by its contracts until Toledo should pay appellee a fair compensation for such water and water rights under said contracts. Toledo by decree entered on the mandate of the United States Circuit Court of Appeals is permanently enjoined from taking the water out of Lineal Part 1 and from interfering with its flow in any wise until such compensation shall be made, thus securing to appellee a complete remedy for compensation for loss of its water rights under said contracts. (R. 138, Decree on Mandate.)

If the state highway director should be allowed to carry out the commands of the Act in question and attacked in this case, the water would then be drained from, and the water from the Maumee River be prevented from entering Lineal Part 2 of the canal. This action would totally deprive appellee of all the water called for by its contracts and all its rights thereunder and destroy the hydro-electric pant without compensation of any kind to appellee just as effectually as if it were diverted at the southwesterly end of Lineal Part 1 into the Maumee River.

9. The State by Subsequent Legislative Acts Confirmed Appellee's Contracts

Appellee's contracts were, through legislation enacted by the law making body of Ohio, recognized, ratified and confirmed not only by Section 4 of the Act of 1902 (Appendix, Paragraph 42, page 246) and by the Act of January 22, 1920, under which Toledo bought Lineal Part 1 (Appendix, Paragraph 35, page 225), but they were again recognized, ratified and confirmed by the Act of March 27, 1925 (Appendix, Paragraph 37, page

230). This latter Act declared an abandonment for both canal and hydraulic purposes of Lineal Part 2 of the canal in question here. It gave the commissioners of Lucas County an option to buy Lineal Part 2 at a price to be fixed by a board of appraisers appointed by the governor plus a fair compensation to be paid by such county commissioners to the state's lessees of either lands or water or both under their existing leases, including the rights of said owners to a renewal of said existing leases, for the loss of the rights of such lessees under such leases because of the execution of the Act. (See Sections 1, 4, 5, 6 and 8 of the Act, Appendix, Paragraph 37, page 230.)

B. POINTS OF LAW

1. **The United States District Court for the Southern District of Ohio, Eastern Division, Had Jurisdiction of This Case.**

2. **Appellee's Law Lease, Stipulation Exhibit No. 1 (R. 68) as Modified by the Supplementary Agreement, Stipulation Exhibit No. 2 (R. 74) Was Renewed for a Second Period of Thirty Years Beginning March 12, 1925, and Extending to March 12, 1955.**

3. **Appellee's Seven Contracts Existing Between It and the State of Ohio Were Entered Into and Carried on by Ohio in Its Proprietary or Private Capacity Through Its State Board of Public Works Thereunto Duly Authorized by Law and the Contract Entered Into by Ohio Direct with the City of Toledo**

Through Legislative Enactment, for the Use and Benefit of Appellee Was Made and Entered Into by Ohio in Its Proprietary or Private Capacity. Each of These Two Classes of Contracts Is Within the Protection of Section 10 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment to that Constitution.

4. **The Act in Question Here Passed May 11, 1927, (Appendix, Paragraph 39, p. 236) Shows on Its Face That There Is No Intention on the Part of the State Itself Ever to Devote These Canal Lands, Lineal Part 2, to Highway Purposes, But That on the Contrary It Is an Act Designed Particularly to Turn This Property, Which Belongs to All the Citizens of Ohio, Over to the Political Subdivisions of Lucas County and the Townships and Municipalities Along the Line of Such Lands Without Any Consideration Moving From Such Subdivisions.**

The four points of law set forth above will be discussed in their order in the argument.

III

ARGUMENT AND AUTHORITIES

1. **The United States District Court for the Southern District of Ohio, Eastern Division, Had Jurisdiction of This Case.**

Jurisdiction in the court below to entertain this case has never been disputed. The bill of complaint (R. 1)

shows that the appellee, plaintiff below, is a corporation organized under the laws of Ohio with its principal office and place of business at Toledo in the Western Division of the Northern United States Judicial District of that state; that it was so organized prior to the year 1900 for the purpose of generating electricity and supplying the same to the public for light, heat and power purposes and for the purpose of acquiring, owning and holding all property of any and all kinds necessary or proper to be used in conducting said business, including the acquirement and holding of leases and other contracts for water and lands to be used in the generation of such electricity through hydro-electric power plants and otherwise; that the defendant state highway director of Ohio was a citizen of Ohio resident in the Eastern Division of the Southern United States Judicial District of that state at Columbus; and that the matter in controversy in the suit exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00) and arises under the Constitution of the United States of America. The other facts set forth above in the statement of the case are shown in the bill of complaint.

The instant case is parallel with and the jurisdiction is sustained under the ruling of this court in *Cuyahoga River Power Company, Appellant, vs. City of Akron, Appellee*, 240 U. S. 462; 60 L. Ed. 743.

Ohio Public S. Company vs. State, 274 U. S. 12, 13, 14; 71 L. Ed. 898.

2. Appellee's Law Lease, Stipulation Exhibit No. 1 (R. 68) as Modified by the Supplementary Agreement, Stipulation Exhibit No. 2 (R. 74) Was Renewed For a Second Period of Thirty Years Beginning March 12, 1925, and Extending to March 12, 1955.

The Law lease was executed and delivered by the State of Ohio through its board of public works to the original lessee, Robert J. Law, under date of March 12, 1895, to run for a primary period of thirty years beginning on that date and ending on March 12, 1925. It was acquired by appellee through assignment from the original lessee with consent of the board of public works through resolution duly adopted by that board on September 11, 1900. It grants to the lessee

> "the use and occupation of all the surplus water of the Miami and Erie Canal between Providence and Toledo not needed for navigation or not now under lease."

It also grants to the lessee the use and occupation of certain lands lying between Lineal Part 1 of the canal and the hydro-electric plant as described in the last paragraph of the lease.

This lease contains a renewal clause for a second period of thirty years, copy of which renewal clause is as follows:

> "And it is further understood and agreed, that at the expiration of this agreement the party of the second part shall be entitled to a renewal of the lease, for a like term of years, for such annual rent as may be offered by the highest responsible bidder, who shall also agree to purchase of said party of the second part, all permanent and valu-

able buildings necessarily erected by said party for the convenient use of the water power hereby leased, at such price as such buildings shall be adjudged to be worth by three judicious, disinterested freeholders, to be chosen as hereinbefore specified; provided, such buildings shall be erected on land belonging to the state, or land which can be purchased by said bidder at a reasonable price, to be determined by said appraisers. And if no such bid shall be made on the terms aforesaid at a higher rent than is herein specified, said party shall be entitled to such renewal on the terms of this lease."

The supplementary agreement, Stipulation Exhibit No. 2 (R. 74), was entered into between the State of Ohio and appellee in December of 1910.

By paragraphs 4 and 5 of the Stipulation and Agreement on the Evidence (R. 60, 61), it is agreed between the parties that appellee is the owner of all the contracts, copies of which are Stipulation Exhibits Nos. 1 to 7, inclusive (R. 68 to 101); that it acquired them respectively at the times as set forth in the bill of complaint, and in said paragraph 4 just mentioned and that from the time of appellee's acquirement thereof, respectively, it has paid all rentals provided for appellee to pay in each of said contracts; that such payments have been accepted by the State of Ohio and that appellee has throughout the time of its ownership of said contracts, respectively, performed each and all of the obligations stipulated in each of them for appellee to perform, and this includes an agreement in paragraph 5 of the Stipulation and Agreement on the Evidence that *appellee has paid to the state, and the state has accepted from appellee, the same payments under said Law lease*

and said supplementary lease since the expiration of their primary terms on March 12, 1925, as had been paid under those leases prior to that time and as called for in each of them respectively *down to the present time*. It is alleged in the bill of complaint and admitted by the answers that appellee is able and desires to continue the payments of all the rentals called for by each of said contracts and perform all the other obligations provided for in each of them for it to perform unto the end of the leasing terms specified in each of them respectively and any renewal terms provided for in each of them respectively, if renewed.

So far as defendant the City of Toledo is concerned, the question of the renewal of the Law lease and the agreement and lease supplementary thereto was settled, and they were held to be renewed for another period of thirty years from March 12, 1925, in the case of *The Maumee Valley Electric Company vs. The City of Toledo*, 13 Fed. Rep., 2d Series, pages 98 to 105. No state officer was a party to that case, but the same facts are now admitted and stipulated with reference to such renewal in this case as were admitted and stipulated in that case.

It is agreed in paragraph 6 of the Stipulation and Agreement on the Evidence that the appellee filed its application with the director of highways and public works and superintendent of public works at Columbus, on August 7, 1924, prior to the expiration of the primary term named in those leases of March 12, 1925, for a renewal of all its said contracts, namely, the Law, Supplemental, Studer, Tryon, Maumee Paper Company and Detwiler leases, Stipulation Exhibits Nos. 1 to 6,

inclusive, and that Stipulation Exhibit No. 19 is a copy of that application (R. 140).

It is also agreed in paragraph 11 of the Stipulation and Agreement on the Evidence that appellee gave a written notice to the governor of Ohio and to the director of highways and public works and superintendent of public works at Columbus and took the court proceedings set out in said paragraph 11 as to appellee's election to take a renewal and preserve it of said Law lease and the agreement and lease supplementary thereto. (See Stipulation Exhibits Nos. 20, 21 and 22, R. 141 to 152.)

It would seem to be unnecessary to comment further upon the question of the renewal of these two leases except to cite in support of our contention the case of *The Maumee Valley Electric Company vs. The City of Toledo et al.*, 13 Fed. Rep., 2d Series, 98 to 105, inclusive, but we have made an examination of the authorities on the question of renewal of leases, and on that question we submit the following:

Even without the right of renewal expressly set forth in the lease, the holding over by the appellee after the expiration of the lease creates a tenancy upon the same terms and subject to the same covenants as those contained in an expired lease.

Black vs. LaPorte, 271 Fed. 620, and cases cited.

But in the case at bar the lease contained an express privilege of renewal, and under such circumstances the rule is stated in 35 Corpus Juris, p. 1022, Sec. 151, thus:

"Effect. Where a timely notice is given or request made for a renewal or extension under the provisions of the lease, the rights and obligations of the parties become mutually fixed. The notice of itself constitutes a renewal, and automatically creates a new lease, and failure to acknowledge receipt of the notice does not prevent the renewal from becoming binding on the tenant."

So also at Section 153 in the same volume and page the author restates the rule as follows:

"Effect of Election. When an election is once made, both parties to the lease become bound thereby, and the lessee, having elected to accept a renewal, is entitled to retain possession of the property."

In the general discussion of this subject many authorities will be found which differentiate between the mere holding over under (a) a lease not containing a privilege of renewal, (b) a lease containing a privilege of renewal and providing for notice of the intention to renew, (c) a lease providing for a privilege of renewal without any notice of intention to renew, etc., but none of these distinctions need be discussed here, for the reason that in the case at bar we have a lease containing a plain, simple, unequivocal privilege of renewal; an express and timely notice of the lessee's intention to renew notwithstanding the lease required no such notice. Stipulation Exhibits Nos. 19 to 22, inclusive; the receipt and acceptance of that notice by the board of public works; the holding over by the lessee under the lease, and the receipt by the state of all installments of rental for the renewal period. Under such conditions, or even under the combination of any two of them, the lease stands renewed.

In *Orr vs. Doubleday, etc.*, 223 N. Y. 334; 119 N. E. 552; 1 A. L. R. 339, the third clause of the syllabus is as follows:

> "The exercise by a tenant of the privilege of renewing a lease for an additional term creates a present demise for the aggregate of the first and extended terms without the necessity of a new lease for the additional years."

This case is interesting in that it discusses at length the distinction sometimes attempted to be made between a privilege or covenant of renewal and a privilege or covenant of extension, some authorities holding that the former is a right to the grant of an estate, the latter a present demise operative immediately upon the exercise of the privilege. In holding that the distinction is more fanciful than real, the court makes the following observations, so directly applicable to the case at bar that they are here reproduced in full:

> "In no subsequent decision by us has the question been considered. The distinction made by the body of judicial opinion we have referred to is too refined and theoretical to be real, as a matter of law in practical affairs. Men of ordinary learning, intelligence, and experience do not universally heed or invoke it in their business transactions. The law is neither just nor practical when it founds decisions of controversies exclusively upon that distinction. The word 'renewal' or the words 'to renew' have not a definite and fixed legal significance to which the parties are bound by the use of them.
>
> A lease, like any other contract, is to be enforced in accordance with the expressed intention of the contracting parties. If interpretation of its language is necessary, the proper and established rules are to be applied. The language in

> question of the lease at bar means that the demise was for ten years absolutely and for ten additional years in case the lessee so elected, and gave the required notice of its election. The lease is a present demise of the premises. The defendant entered into occupation under it. The lessor had no choice or decision in the matter of renewal. The letting was for the term of ten years 'with the privilege to said tenant of a renewal for another term of ten years upon the same terms as are contained herein.' There is no express covenant on the part of the lessor to enter into a new lease or do other act. The only acts called for to effect the renewal are on the part of the defendant. The renewal did not evoke new conditions of continuance in occupation, and a new lease would be useless."

But even if a notice of intention to renew was necessary under the Law and supplementary leases, such a notice was given by the appellee and accepted by the board.

We have been unable to find any decisions of the Ohio Supreme Court on this general subject, the rule being apparently so well settled that litigants in cases of this character have been content to stop with the Court of Appeals. In *Gross vs. Clauss*, 6 Ohio Appeals 140, the first clause of the syllabus is as follows:

> "A lease for a term with a privilege or option in the tenant of a renewal or extension for a further term, upon the same terms and conditions, is a present demise as to the renewal to begin at a future time, and under such covenant no new lease need be required, but any indication on the part of the tenant of his intention to avail himself of his privilege operates to extend to him the right of the additional term."

The case at bar is an even stronger one in favor of the appellee because here appellee has notified the board of its intention to renew, whereas in the case last cited no notice of the intention to renew was given, the lessee merely continuing to occupy the premises and to pay the rent for three months after the expiration of the original term.

In *Owen vs. Barrie*, 14 Ohio Appellate Reports 104, the court concedes that the holding over constitutes an election to hold for the extended term in cases where the lease requires no notice of the intention to exercise the option. That is true of the leases in the case at bar and here we have the added fact that appellee, as has already been seen, gave notice of its intention to renew, notwithstanding the leases did not so require.

In *Foster vs. Ellison*, 31 O. C. C. 513, the second clause of the syllabus is as follows:

> "Title Quieted of Lessee of Permanent Leasehold Upon Election to Renew and Payment of Rent Arrearages.
>
> A lessee under a lease for three and one-half years renewable forever, holding over twenty days before notice to vacate the premises is served upon, thereby elects to renew; and having offered to pay all arrearages of rent due on the lease, conditions upon which forfeiture could be declared for non-payment of rent not having been complied with by lessor, the lessee is entitled to a decree quieting his title to a permanent leasehold."

In *Crenshaw, etc., Lumber Company vs. Norton*, 72 Southern 140; L. R. A., 1916 E., p. 1227, the second clause of the syllabus is as follows:

"Landlord and Tenant—Option for Renewal—Necessity of Notice.

2. No notice of intention to renew is necessary under a lease covenanting that the lessee shall, at the expiration of the term, have the option to renew, without any provision for the execution of a new lease, there being but a mere contemplation of an extension under the old one."

Nor will the court fail to note that under the Law lease in question not only was no notice of the intention to renew required, but the lease specifically provided that the renewal should be "on the terms of this lease." True, this proviso was subject to the contingency, expressed in a prior clause of the lease, that there should be no higher bid for the water rights, but there was no such higher bid, and so that contingency may be disregarded.

In 2 Underhill, Landlord and Tenant, page 1377, paragraph 809, the author states the rule as follows:

"Where a lease conferring an option to renew upon the lessee omits to provide that he shall notify the lessor of his election to renew, a notice from him to his lessor of his intention to renew is not required. In such case the lessee's merely remaining in possession after the term has expired is an exercise of the option to renew, and binds both him and his lessor for a new term."

The question being so well settled, further citation of the rule would seem to be superfluous. Brief reference is, however, made to the following cases:

In *Thurston vs. Woolworth Company*, 117 Northeastern 686, Ind. App., the court held that in the absence of a specific provision in the lease, any form of

notice indicating an intention on the part of the tenant to avail himself of the option of renewal is sufficient.

In *House vs. Burr*, 24 Barb. 525, it was held that notice by a lessee that his assignee desired to exercise the privilege of renewal under a lease was sufficient.

Even an oral notice has been held to be sufficient.

Gaggiano vs. Gallorenzi, 57 N. Y. Supp. 2:
McClelland vs. Bush, 150 Pa. 57.

Other cases to the same effect are cited in the note in 1 A. L. R., page 344.

It has even been held that where the lease does not show how notice of an intention to renew shall be made, an oral notice is sufficient.

Darling vs. Hoban, 53 Mich. 599.

We only cite these cases to show how fully within the rule is the case of the appellee's renewal of the Law and supplemental leases. Without any provision or requirement for notice of its intention to renew, appellee has nevertheless given such a notice. Without any provision for a notice in writing, appellee's notice to the board nevertheless took that form—and we have been unable to find a single authority upon which it could be even remotely claimed that the Law and supplemental leases do not now stand renewed for thirty years from March 12, 1925.

It will be remembered that appellee's four minor leases, the Studer, Tryon, Maumee Paper Company, and Detwiler leases, have not yet expired *even in their primary terms* and do not expire *until the year* 1931 for one of them, 1933 for two of them, and 1936 for the fourth

one, but each one of them contains a renewal clause in the same wording as is contained in the Law lease, and appellee's application for a renewal of the Law and supplemental lease included application for renewal of these four minor leases. Whether any one of these four leases (minor leases so-called but minor only in that they do not sell or lease to appellee as much water as is sold or leased to it by the Law lease) shall be renewed at the end of its primary period of thirty years will of course depend upon circumstances at the end of its primary term. Appellee has already, as shown above, elected to renew each of them, but appellee of course will be compelled to pay a higher rental for the renewal term of thirty years in each case if any outside party shall see fit to bid a higher rental than appellee is now paying under the primary term. There can scarcely be any question, however, but that appellee will elect to pay such higher rental if any shall be offered because the water called for by each of these leases is used at the hydro-electric plant to make up the total of 422 second feet of water used there in operating the plant as nearly to its capacity of 2700 horsepower as possible and appellee considers its said election to renew them as final and binding on it in any event.

Referring again to the renewal of the Law lease as modified by its supplementary agreement, appellants make no claim that appellee has ever been in default in any respect in the performance of its obligations under said lease and supplementary agreement. As shown above, appellants admit that appellee has fully performed all its obligations and they admit that appellee in August of 1924 duly filed its application for renewal of

all these contracts, such election and application for renewal being thus made six months prior to the expiration of the primary term of the Law lease and its supplementary agreement, said primary term expiring on March 12, 1925. Full performance by appellee of all of its obligations under the contracts and of its regular and timely election and application to renew such contracts was admitted by defendants in the case of *The Maumee Valley Electric Company vs. Toledo*, 13 Fed., 2nd Series, 98-105, but defendants there claimed that the Law lease and its supplementary agreement had not been renewed because, as they claimed, such contracts had all been cancelled, rendered null and void, by the passage of the Act of January 22, 1920, declaring an abandonment for canal and hydraulic purposes of Lineal Part 1, which Act was construed in that case and under which Toledo bought Lineal Part 1. Defendants in that case made that claim notwithstanding that legislative Act fully recognized, ratified and confirmed all these contracts and expressly provided that if Toledo should buy Lineal Part 1 it must buy it, and the deed therefor would only be given by the state to Toledo excepting therefrom and subject to the rights of the state's lessees under their existing leases for either land or water or both and the rights of such lessees to a *renewal* of such contracts.

3. **Appellee's Seven Contracts Existing Between It and the State of Ohio Were Entered Into and Carried on by Ohio in Its Proprietary or Private Capacity Through Its State Board of Public Works Thereunto Duly Authorized by Law, and the Contract Entered Into by Ohio Direct With the City of Toledo, Through Legislative Enactment, for the Use and Benefit of Appellee Was Made and Entered Into by Ohio in Its Proprietary or Private Capacity. Each of These Two Classes of Contracts Is Within the Protection of Section 10 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment to that Constitution.**

a. *Appellee's Contracts Given by Ohio in Its Private Capacity*: The first discussion under this point of law will be with reference to appellee's seven contracts which we claim were entered into and have been carried on by the State of Ohio in its proprietary or private capacity through its State Board of Public Works thereunto duly authorized by law (except that since amendment to the Constitution in 1912 the Superintendent of Public Works, successor to the Board, has been the state administrative authority), and that these contracts are within the protection of Section 10 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment of that Constitution against the legislative Act attacked in this case, passed May 11, 1927. (Appendix, Paragraph 39, page 236.) Appellants claim that these contracts are ruled by the cases of

Hubbard vs. Toledo, 21 O. S. 379, decided in 1871;

Elevator Co. vs. Cincinnati, 30 O. S. 629, decided in 1876;

Fox vs. Cincinnati, 33 O. S. 492, decided in 1878; 104 U. S. 783; 26 L. Ed. 928; and

Vought and Walsh vs. C. H. V. Ry. Co., 58 O. S. 123, decided in 1898; 176 U. S. 478; 44 L. Ed. 548;

and that under those cases appellee's contracts must be held to have been entered into and carried on by the State of Ohio in its governmental or public capacity and that such contracts are not within the protection of the contract clause and the first section of the Fourteenth Amendment of the United States Constitution.

The question as to whether appellee's contracts are such contracts as are protected by the sections referred to of the Federal Constitution is a question which this court will decide for itself. This is not a case in which this court, without independent action on its part, regardless of the facts, is concluded by prior decisions of the Supreme Court of Ohio.

Jefferson Branch Bank vs. Skelly, 1 Black 436-443; 17 L. Ed. 173-177.

In this case the Jefferson Branch of the Ohio Bank had been organized under the Act entitled, "An Act to incorporate the State Bank of Ohio and other banking companies," passed February 14, 1845. Under the sixtieth section of that Act any bank organized under the Act was required to set off to the state six per centum of its profits and this was to be paid to and received by the state in lieu of all taxes which the bank and its stockholders on account of the stock held by them were bound

to pay. Thereafter in 1852 the legislature passed an Act providing for the assessment and taxation of all property in the state according to its true value in money, and in pursuance of that Act the county authorities levied upon the property of the Jefferson Branch Bank for the year 1852 the sum of $5,303.70 as taxes. The county treasurer, Skelly, defendant in error, entered the banking room of the bank and seized that amount of money to satisfy the tax levied under the Act of 1852 and penalty for default on the part of the bank in making payment thereof. It was claimed in the case by the district attorney, counsel for the county, that this court was bound by the prior decision of the Supreme Court of Ohio which held that the charter of the bank was not a contract within the protective provisions of the Federal Constitution forbidding the impairing of the obligations of contracts. In answer to this claim Mr. Justice Wayne, delivering the opinion of the court, used the following language:

> "We answer to this, as this court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the states to state legislation and to state constitutions, have been conclusive upon this court, with a single exception, and that is when it has been called upon to interpret the contracts of states, 'though they have been made in the forms of law,' or by the instrumentality of a state's authorized functionaries, in conformity with state legislation.
>
> "It never was intended, and cannot be sustained by any course of reasoning, that this court should or could, with fidelity to the Constitution of the United States, follow the construction of

the Supreme Court of the state in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a state upon such a contract, whether it be one claimed to be such under the form of state legislation, or has been made by a covenant or agreement by the agents of a state, by its authority."

Appleby vs. New York, 271 U. S. 364-379; 70 L. Ed. 992-999.

In the *Appleby* case the City of New York in 1730 under charter granted by the executive representative of the crown acquired title to the land between high and low water surrounding the Island of Manhattan. These grants were afterwards confirmed by the Constitution of 1777 of the State of New York, and by the Act of 1807 the State of New York granted to the city a strip of land under water along the westerly side of the island which extended from low water mark westerly into the Hudson River a distance of 400 feet. In 1853 the city granted to Appleby land under water between 39th and 40th Streets. The deed was one granting title in fee simple to Appleby, his heirs and assigns forever. Under authority of an Act of 1871 the city authorities excavated the ground underneath the water in 39th and 40th Streets and alongside the lands conveyed to Appleby covered by the deed to Appleby and made use of the outer portion of this ground for public docking purposes, claiming that the City of New York had no authority or power to grant the title in fee simple conveying both the private and the public right to this land under water. The question in the case was whether the

deed was a contract, and if so, whether its obligations were impaired by the legislative Act of 1871. The Court of Appeals of the State of New York held that the deed was not such a contract and was not within the protection of the contract clause of the Constitution. It was claimed on error to this court that it was controlled by the decision of the Court of Appeals of the State of New York, and in answer to that claim Mr. Chief Justice Taft in the opinion at pages 379 and 380 says:

> "The questions we have here to determine are, first, was there a contract; second, what was its proper construction and effect, and third, was its obligation impaired by subsequent legislation as enforced by the state court? These questions we must answer independently of the conclusion of that court. Of course, we should give all proper weight to its judgment, but we cannot perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration. It makes no difference what the answer to them involves, whether it turns on issues of general or purely local law, we cannot surrender the duty to exercise our own judgment. In the case before us, the construction and effect of the contract involved in the deeds and covenants depend chiefly upon the extent of the power of the state and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself. That is a state question, and we must determine it from the law of the state, as it was when the deeds were executed, to be derived from *statutes then in force* and from the *decisions of* the state court *then* and *since* made; but we must give our own judgment derived from such sources

and not accept the present conclusion of the state court without inquiry.

Ordinarily this court must receive from the court of last resort of a state its statement of state law as final and conclusive, but the rule is different in a case like this."

Larson vs. South Dakota, — U. S. —, decided by this court February 18, 1921.

Each of the above cases was a case reviewed in this court on error to the court of last resort in the state in which it originated, but we take it that the principles declared by this court in the language quoted above in the *Skelly* and *Appleby* cases apply in the instant case in deciding the question whether appellee's contracts are ruled by the *Hubbard, Elevator Company* and *Fox* cases cited above and decided many years ago on the particular facts of those respective cases, or whether appellee's contracts in question here and differing widely, not only in the contracts themselves, but in the facts and circumstances as well under which they were written and have been operated from the beginning until now, shall be ruled by later decision of the Supreme Court of Ohio applying, as we contend, to appellee's contracts and the facts and circumstances under which they were written and have been and are being carried out.

The *Hubbard, Elevator Company* and *Fox* cases were cases involving parts of the Miami and Erie Canal. The *Vought* and *Walsh* cases involved a part of another canal not connected with the Miami and Erie Canal, namely, the Hocking Canal in the south central part of the state, and being a part of the Southern Division of

the Ohio Canal. Appellee's contracts and its rights thereunder under the facts and circumstances of such contracts are governed by the case lately decided by the Supreme Court of Ohio, 1926, of *State ex rel. Crabbe, Attorney General, vs. The Middletown Hydraulic Company*, 114 O. S. 437, 448, in which case that court in defining the capacity in which the State of Ohio now owns and since the termination of navigation on the Miami and Erie Canal has held and owned that Canal and the lands thereof, declared as follows:

> "Whatever may have been the capacity in which the state functioned in the construction of the Miami and Erie Canal for the purpose of a navigable highway across the state for the use of the general public, its function now, since the abandonment of the canal as a navigable highway, is that of a commercial proprietor, engaged in the operation of a great power plant for the sale of power and water to private individuals, and the rights of the state, as such proprietor, in this particular property, which have not heretofore been judicially determined, but are to be determined now for the first time, should be and will be measured by rules that are applicable to proprietors generally and applicable to like transactions between private individuals.
>
> In conducting transactions with respect to its lands, the state acts in a proprietary, and not in a sovereign capacity, and, being amenable to all the rules of justice which it prescribed for the conduct of its citizens, it will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains. *Cleveland Terminal & Valley Rd. Co. vs. State ex rel.*, 85 Ohio St. 251; 97 N. E. 967; 39 L. R. A. (N.S.) 1219.
>
> When the state appears in her courts as a suitor, to enforce her rights of property, she comes shorn of her attributes of sovereignty, as

> a body politic, capable of contracting, suing, and holding property, subject to those rules of justice and right, which in her sovereign character she has prescribed for the government of her people. *State vs. Executor of Buttles*, 3 Ohio St. 309."

This case was an action in *quo warranto* in the Supreme Court of Ohio filed by the State of Ohio on relation of the Attorney General versus the defendant Middletown Hydraulic Company. The defendant was a corporation organized under the laws of Ohio. The petition alleged the state ownership of what was known as the Middletown feeder, a part of the Miami and Erie Canal; that the defendant owned and operated a manufacturing plant located in the vicinity of the feeder and that the defendant then was and for a long time had been diverting water from the feeder to its manufacturing plant for manufacturing purposes without authority of law and without the consent of the state; and the prayer was that the defendant be required to answer on what authority it claimed to have used and enjoyed such rights, privileges and franchises set out in the petition. The facts were that prior to the construction of the Miami and Erie Canal one Abner Enoch owned the lands upon which the Middletown feeder was afterwards located and he owned the water rights which he had acquired at that point prior to any possession by the state as a proprietor. Enoch had constructed a mill race on these lands for the purpose of drawing water from the Miami River through such mill race for the operation of his mill. On July 28, 1825, Enoch gave a deed to the State of Ohio which recites:

> "In consideration of the benefits which will be conferred upon all who own real property in the

vicinity of the said canal and upon myself in particular, and also in consideration of the sum of one dollar to me in hand paid by the said commissioners in behalf of the said state, I hereby for myself and my heirs give, grant, cede and forever transfer to the State of Ohio all the lands belonging to me which shall be necessarily occupied by the site of said canal and also by the site of the towing paths, feeders, aqueducts, reservoirs, spoil banks and culverts connected therewith. (All water privileges reserved to myself as to mill seats, etc.)"

The state constructed a dam across the Miami River and from that river beginning at a point above the dam it constructed a feeder over and through Enoch's mill race site of sufficient capacity to supply the state's needs for canal purposes and the needs of Enoch, and it constructed a weir or gauge in the feeder for the use of Enoch in furnishing the water he had theretofore been using from the river from above his own dam. Water was thus supplied to Enoch for thirty-two years after the transaction between him and the state and then to the defendant Hydraulic Company, his successor in title, for sixty-eight years.

The Hydraulic Company filed an answer in the case setting up five defenses to the state's action in *quo warranto*.

Its first defense pleaded the reservation by Enoch of his water rights from his grant to the state of the land upon which the Middletown feeder was constructed and pleaded the succession by defendant to those water rights of Enoch and it denied a diversion by it of any other water from the feeder.

The second defense in detail pleaded the ownership by Enoch of the lands upon which the feeder was afterwards located and the water rights which he had acquired at that point prior to any possession by the state, pleaded the conveyance by Enoch to the state of the lands upon which he had theretofore erected a mill race, the reservation from that grant of his water rights and the acceptance of that grant by the state with the reservation. The defense further pleaded that the waters available from the river at that point were far greater than necessary for the operation of the canal and that they were and ever since have been sufficient for the purposes of the canal and the purposes for which Enoch theretofore acquired the water rights; that afterwards the state entered into a contract with Enoch to construct a new dam, feeder and head gates upon or near the site where Enoch had theretofore maintained the dam; that in such contract it was provided that the dam, feeder and head gates should be constructed of capacity sufficient to provide water both for the canal and the use of Enoch; that the state did construct a dam, feeder and head gates of such capacity for the purpose of continuing unto Enoch, his heirs and assigns, his water rights as before the construction of the Miami and Erie Canal; that defendant succeeded to the title of Enoch and the continuous use by defendant and its predecessor for one hundred years and the use by defendant in the case since 1857, all with the knowledge and consent of the state; alleges the partial destruction in 1913 by flood of a former feeder and dam and reconstruction thereof with a diversion dam for the use of defendant Enoch by the State of Ohio in pursuance of its contract of 1826 with Enoch,

and it pleads continuous observance and compliance with that contract by the state through all that period; and it pleads ownership in defendant of the lands adjacent to the state dam and that it is entitled to all the riparian rights of such ownership, subject only to the grant to the state for navigation purposes.

The third, fourth and fifth defenses are described by the court (441, 442) in its opinion as follows:

> "The third defense avers that the State of Ohio, under the act authorizing it to construct and operate the Miami and Erie Canal, was only authorized to and only did appropriate such waters from the Miami River through the Middletown feeder as were necessary for the purpose of navigation in and along the canal from what is known as the state dam to the City of Cincinnati, taking into consideration all waters that were delivered to such canal from various other sources north of such dam; that the State of Ohio has now abandoned the Miami and Erie Canal from the state dam northwardly, and no water is furnished for such canal north of the state dam, either for navigation or any other purpose, and that the State of Ohio is now diverting from the Miami River above the state dam larger quantities of water than it is entitled to have under the terms of the act permitting the appropriation of water for canal purposes and under its agreement with Abner Enoch; that the State of Ohio has abandoned for navigation purposes the Miami and Erie Canal from the state dam southwardly to the City of Cincinnati, and has permitted bridges, viaducts, and other constructions to be built across the canal that make it impossible to use the canal for navigation purposes; that since 1913 no portion of the canal has been used for navigation, and it is not the intention of the State of Ohio to again use the canal for that purpose; that the purpose of the construc-

tion of the canal has entirely ceased; that the State of Ohio, under the act providing for the construction of the canal, and under its contract with Abner Enoch, is not entitled to take any water from the river for the purpose of providing hydraulic power to manufacturers and others; that the act of the State of Ohio, permitting it to lease water for power purposes, authorized only such as were incident to the use of the canal for navigation, and that the State of Ohio is without power, under any act of the legislature, to own, operate, or maintain a canal solely for the purpose of leasing water to others for power purposes.

The fourth defense is a plea of estoppel against the state by reason of its pleadings and the decree in the case of *Enoch vs. State of Ohio*, in the Butler County Common Pleas and in the Ohio Supreme Court; and the fifth defense is estoppel of the state by its standing by and permitting and encouraging the expenditure of money by the defendant and its predecessors in title for one hundred years on the strength of a title which the state for all that period recognized."

The state filed a demurrer to each of these defenses. The court in passing on the demurrer to the first and second defenses on page 443 of the report says:

"Since the defenses one and two are in the main the same, we will consider them and the demurrer to them as raising the question of the validity of the reservation, from limitation of or exception to the grant of Abner Enoch to the state, and the right of the defendant, as a successor to Enoch, to divert water from the Middletown feeder."

It was in passing upon the demurrer to the first and second defenses, as shown above, that the court used the language hereinabove quoted deciding as to the capacity in which the State of Ohio owns and controls the canal

lands of the Miami and Erie Canal, and also deciding as to what rules of law govern the state in its dealings with citizens with respect to such lands.

Then when the court comes to pass upon the third defense (457) as set out above, challenging the power of the state to maintain the canals for the purpose of leasing water to others for power purposes and to pass on the demurrer filed by the state to that defense, it uses the following language:

> "The third defense, that the state, having abandoned the purpose for which it acquired its Miami and Erie Canal water rights, is now without authority of law exercising those water rights for a wholly different purpose, is met by the two principles heretofore discussed.
>
> (1) That in its proprietary capacity, its property rights are the same as those of private proprietors.
>
> (2) That the specific purpose for which it acquired water rights does not limit it to the use of those rights for that purpose, unless it is expressly prohibited from using them for any other purpose, but the specific purpose for which they were acquired operates as a limitation of quantity and not of character of use.
>
> The demurrer to the third defense is sustained."

The defendant Hydraulic Company by its first and second defenses sought to establish that it, as the successor to the rights of Enoch, was taking water out of the Miami and Erie Canal by virtue of the reservation inserted by Enoch in the deed to the State of Ohio, and claimed, of course, that it was exercising a right which had never passed to the state. The court sustained defendant in this contention and overruled the demurrer of the state to these two defenses. But defendant de-

sired the court to hold under its third defense that the state could not operate the canal for the purpose of supplying water power to individuals generally under leasing contracts because the State of Ohio had never been authorized, and was without power, under any act of the legislature to own, operate or maintain a canal solely for the purpose of leasing water to others for power purposes after navigation thereon has been abandoned.

As stated above, the state demurred to this defense thereby claiming of course that it did have such power. The court sustained the state's demurrer to this defense and therein sustained its contention that it did have such power.

Let us not forget that when defendant company in the *Middletown* case interposed the defense of lack of power in the state to maintain the Miami and Erie Canal for the purpose of leasing water to individuals generally under leasing contracts for power purposes after navigation thereon had been abandoned, the state immediately accepted the challenge (and rightfully so), filed a general demurrer to this third defense and under the decision of our highest state court it was sustained. On that important question—important to the State of Ohio from the standpoint of revenue and important to all of her citizens using hydraulic power from this canal—our Supreme Court established the rule which we must assume the state in that case earnestly desired.

The court in its opinion says that this grave question of the power of the state to maintain and operate this canal for water power after abandonment of navigation thereon was then before the court for the first time with respect to the canal lands of the Miami

and Erie Canal. It was not speaking of simply the lands occupied by the Middletown feeder and the particular dam from above which water was being drawn through said feeder furnishing hydraulic power to Enoch and other people, but it speaks in broad and inclusive language involving the entire property of the Miami and Erie Canal. What other rule could the court in justice and equity to citizens and in conformity with proper and intelligent administration of this property of the state declare upon the question involved? A great purpose for which this canal was constructed (defendants claim it was the only purpose), namely, navigation, had been abandoned for many years. As to the property in question in the instant case, such transportation has been abandoned for practically thirty-five (35) years. The progressive commercial enterprise of the people of Ohio carried them far in advance many years ago of such slow moving, lethargic transportation. They have forgotten canal transportation. It now would be a curiosity to witness. The state is no longer and for thirty-five years it has not been a common carrier by such transportation. That branch of its business is gone. Defendants, this court and everybody knows it can never be revived. This property then belongs to and is in the possession of the state in the same capacity as any farmer owns his farm, any merchant his store, or any manufacturer his factory. It is not now and it has not been for practically thirty-five years operated by the state in its public governmental capacity, but in its *private or proprietary* capacity simply as a land owner.

The fact of abandonment set up in third defense of the Hydraulic Company was not an abandonment

effected through any legislative enactment. It was abandonment through refusal by the public to use the canal for navigation purposes. In its third defense the Hydraulic Company pleads that the state had abandoned the canal for navigation purposes southwardly from the state dam above Middletown to the City of Cincinnati, and had permitted bridges and other constructions to be built across it; that since 1913 no portion of the Miami and Erie Canal had been used for navigation and that it is not the intention of the state again to use the canal for navigation.

The General Assembly of Ohio has passed nine abandonment Acts affecting the Miami and Erie Canal and effecting an abandonment thereof throughout its length from the Ohio River to Lake Erie, except that portion extending from Defiance, Ohio, along the Maumee River northeasterly to the southwesterly end of Lineal Part 2.

The first Act, passed March 24, 1863 (Appendix, Paragraph 32, page 221), abandoned the south end of this canal in Cincinnati.

The second Act, passed March 26, 1864 (Appendix, Paragraph 33, page 223), abandoned the north end of this canal in the City of Toledo from Lake Erie south to the northerly end of Lineal Part 1.

The third and fourth Acts, passed April 12, 1888, and March 3, 1891, respectively (85 O. L. 207; 88 O. L. 72), effected an abandonment of that portion of the Miami and Erie Canal which was formerly known as the Wabash and Erie Canal extending from the City of Defiance southwesterly to the west Ohio state line in Paulding County, Ohio.

The fifth Act, passed January 22, 1920 (Appendix, Paragraph 35, page 225), abandoned Lineal Part 1, which is the part purchased by Toledo under that Act.

The sixth Act, passed March 25, 1925 (Appendix, Paragraph 36, page 230), abandoned simply for canal purposes that portion of this canal extending from the Maumee River at the City of Defiance in Defiance County southerly to a point five hundred feet north of the Middletown Dam near the north corporation line of the City of Middletown, Ohio, and this Act provides for the leasing of certain portions of these lands to cities, villages and other political subdivisions of the state.

The seventh Act, passed March 27, 1925 (Appendix, Paragraph 37, page 230), abandoned Lineal Part 2 of this canal extending from the Maumee side-cut in Maumee to the Grand Rapids State Dam at Providence, Ohio, and provided for the sale of the same to the county commissioners of Lucas County, Ohio.

The eighth Act, passed April 21, 1927 (Appendix, Paragraph 38, page 236), abandoned for canal and hydraulic purposes that portion of the Miami and Erie Canal from a point five hundred feet north of the State Dam near the corporation line of the City of Middletown, Ohio, to the then southern terminus of said canal at St. Bernard in the City of Cincinnati, Hamilton County, Ohio.

The defendant's water power in the *Middletown* case is located on this part of the canal, and the above mentioned Act is the first and only legislative Act abandoning that part of the canal. It must be taken as established, therefore, that in deciding the *Middletown* case the Supreme Court of Ohio was not basing its opin-

ion and decision upon the fact of abandonment of the canal for navigation purposes through legislative act, but really upon the fact that navigation had actually been abandoned through refusal of the public further so to use the property. It is true the pleader says that the state had permitted bridges to be put across the canal and it did not intend to use the canal further as a means of navigation, and of course under the demurrer of the state those allegations were admitted, but in the instant case it is specifically pleaded and admitted that navigation had been practically abandoned prior to the year 1894, totally gone before appellee's contracts were acquired; and that it has never been revived (R. 5).

The ninth and last abandonment Act, passed May 11, 1927 (Appendix, Paragraph 39, page 236), is the Act in question in this case seeking to reabandon Lineal Part 2 and declare all water and land contracts null and void.

The conclusion t[illegible]fore seems definitely established and unassailable that the Supreme Court of Ohio in the *Middletown* case decides and rules that since the abandonment by the public of the Miami and Erie Canal as a navigable highway, Ohio owns that property as a commercial proprietor engaged in the operation of a great power plant for the sale of power and water to private individuals, and this even though the state originally constructed such canal for the purpose of navigation, and the case further definitely decides and rules that since such abandonment of navigation the rights of the state in this property must be measured by rules that are applicable to proprietors generally and applicable to like transactions between private individuals.

Of course the court in deciding the *Middletown* case had in mind and was thoroughly acquainted with the *Hubbard, Elevator Company, Fox* and other similar cases upon which appellants rely. The facts and circumstances out of which those cases arose and were decided were wholly unlike the facts and circumstances of the *Middletown* and the instant cases. The difference will be specifically pointed out later in this brief.

b. *Purposes of the Miami and Erie Canal*: Looking to the legislative history of this canal showing the purposes for which it was projected and constructed, namely, navigation for the public and the furnishing of hydraulic power to private individuals, the beginning of decline of navigation within a relatively few years after completion of the construction in 1845, such decline really beginning prior to 1861, and finally total abandonment thereof practically thirty-five years ago while furnishing hydraulic power to private individuals has continued from the beginning of the construction in 1825 to the present time, it is not difficult to see how the Supreme Court of Ohio reached the conclusion and decided as it did in the *Middletown* case.

This canal was constructed under authority given through the Act of February 4, 1825, and the first section thereof from the Ohio River to Dayton was actually authorized by that Act to be put under contract. Section 8 of that Act gave to the canal commissioners the power of eminent domain authorizing them to take possession of and use any lands, waters, streams and materials necessary for the prosecution of the improvements intended by the Act, and to make all such canals, feeders,

dykes, locks, dams and other devices proper for making said improvements, and it provided that all such property should be acquired by the state in fee simple. (Appendix, Paragraph 6, page 200.)

While this Act was entitled "An Act to provide for the internal improvement of the State of Ohio by navigable canals," yet in Sections 5 and 6 of the Act language is used which clearly shows that the General Assembly meant that the state's authorities should promote hydraulic power. Section 5 of the Act, as a means of repaying borrowed money, appropriates and pledges

> "All the net proceeds of tolls collected on the canals and herein described *and of the rents and profits of all works and privileges* connected with or appertaining to said canals and belonging to the state,"

and Section 6 provides that all moneys pledged and appropriated by the Act,

> "together with the net proceeds of all tolls *and of the rents and profits of all works and privileges* connected with said canals,"

should be paid into the state treasury and kept distinct from the other funds of the state.

Section 7 of the Act passed January 31, 1826, provides as follows:

> "That no person shall construct any wharf, basin or watering place on or make or apply any device whatever for the purpose of taking water from either of said canals without first obtaining permission therefor of one of the acting commissioners or of the principal engineer of the canal where such wharf, basin, watering place or device, as aforesaid, is desired, in writing." (Appendix, Paragraph 8, page 204.)

Section 1 of the Act passed February 7, 1826 (Appendix, Paragraph 9, page 205), provides:

> "That the canal commissioners be and they are hereby authorized to procure by purchase or otherwise a suitable number of acres of land at each and every point on or adjoining the Ohio canals heretofore authorized to be constructed where the surplus water passing through such canals may be profitably used for *hydraulic* purposes."

An expenditure of $20,000.00 was authorized by this section for the purposes above stated.

Section 2 of this Act provides:

> "That the canal commissioners are hereby authorized and empowered to sell such lands and town lots as have heretofore been or may hereafter be given, granted or ceded to the state for the benefit of the canal fund, *other than those which are situated at points or places on or adjoining the line of the Ohio canals where the surplus water produced by said canals can be advantageously used for hydraulic purposes.* (Paragraph 11, Stipulation Exhibit No. 23.)"

Section 5 of the Act passed February 11, 1828 (Appendix, Paragraph 11, page 206), provides:

> "That whenever, in the opinion of the board of canal commissioners, any water may be spared from any state canal or works connected therewith without injury to the navigation or safety of such canal, the board may order a sale of such surplus water for a term of years in their discretion to the person who shall bid the highest annual rent therefor; provided, the same shall not in any wise interfere with the rights of individuals. (Paragraph 14, Stipulation Exhibit No. 23.)"

The above section was construed by the Supreme Court of Ohio in the case of *Cooper vs. Williams*, 4 O. Rep., page 253, in which it was held that:

> "Courts of equity cannot control the canal commissioners, in using the quantity of water necessary for the navigation of the canal, upon the complaint of individuals claiming an interest in the water, nor in selling it for hydraulic purposes."

By the Act passed February 18, 1830 (Appendix, Paragraph 15, page 208), in Sections 3 to 7 thereof the canal commissioners were given power to sell or lease at any time for *hydraulic* purposes any lands along or waters from any of the canals of the state or passing around locks, not required, in their opinion, for the purposes of navigation, and these leases or sales could be made

> "Subject to such conditions and reservations as they may consider necessary and proper either in *perpetuity* or for a limited number of years for a certain annual rent or *otherwise* as they may deem most beneficial for the interests of the state."

By the Act passed March 3, 1831 (Appendix, Paragraph 17, page 210), the canal commissioners, with respect to the establishment of hydraulic power, were given power as follows:

> "That where any feeder to either of the canals of this state, from any stream which is not navigable and a public highway, has been constructed, or many hereafter be constructed, at the expense of the state, by which a greater quantity of water may be introduced than is required for the purposes of navigation, thereby creating valuable hy-

> draulic privileges, either on said feeder or on the canal receiving water therefrom; and where the introduction of such additional quantity of water will injure mills or mill sites on such stream between the point where the water is to be taken out, and the point at which it is to be returned into such stream; the canal commissioners shall be authorized to purchase for, and on behalf of the state, any such mill or mill site so liable to be injured, or the right to take from such stream such additional quantity of water, as either may be deemed best for the interest of the state; provided the sum to be paid for such mill, mill site or privilege, shall in no case exceed two-thirds of the sum for which the commissioners shall have ascertained the hydraulic privileges, to be supplied by such additional quantity of water can be sold; or said commissioners may at their option convey to any owners of any mill or mill site, so liable to be injured as aforesaid, a part of the water power to be created as aforesaid as a compensation for the damages sustained by the taking such additional quantity of water from such streams. (Paragraph 21, Stipulation Exhibit No. 23.)"

By the Act passed February 27, 1834 (Appendix, Paragraph 21, page 213), it was provided that all moneys arising from the sale of lands purchased, granted or donated to the state in aid of the canals,

> "together with the net proceeds of all tolls, fines and *water rents* derived from the canal north of Dayton,"

should be subject to the control of the commissioners of the canal fund and be applied to the extension of the canal.

The Act passed January 12, 1837 (Appendix, Paragraph 24, page 214), entitled "An Act appropriating money for the purchase of suitable lands for hydraulic

purposes," appropriated $25,000.00 to be expended in purchasing suitable land along Ohio canals where surplus water could be profitably used for hydraulic purposes.

The Act passed April 3, 1837 (Appendix, Paragraph 25, page 214), appropriated for the purpose of developing hydraulic power $6,000.00 on the Ohio Canal, $9,000.00 on the Miami Canal south and $5,000.00 on the same canal north of Dayton in addition to the sums theretofore appropriated.

By the Act passed March 19, 1838 (Appendix, Paragraph 26, page 215), in Section 13 thereof it was provided as follows:

> "That it shall be the duty of the acting commissioner on the Miami Canal to make selection of such lots of land as may be necessary to the proper use of any water power which may be created by the construction of said Miami Canal, and any works connected therewith, and any other lots which may be necessary to supply timber for the construction and repair of the canal; and shall furnish the register of the Lima land office with a list of all such selections before the sale of any of said lands, and such selections shall thereupon be by such register entered on record, and reserved from sale; and the state hereby reserves the right to make said canals through the lands sold under authority of this Act, clearing all claims for damages done to said lands. (Paragraph 31, Stipulation Exhibit No. 23.)"

By the Act passed March 23, 1840 (Appendix, Paragraph 27, page 215), the Sections 3 to 7, inclusive, hereinabove referred to and quoted in full in Appendix, Paragraph 15, page 208, giving the canal commissioners power to sell or lease water or land in perpetuity, were

re-enacted without change except that the board of canal commissioners in the Act of 1830 were in this Act of 1840 designated as board of public works.

In the Act passed March 7, 1842 (Appendix, Paragraph 28, page 218), by Section 12 thereof, it was provided as follows:

> "That it shall be the duty of the board of public works to make selection of such lots of land as may be necessary to the use of any water power which may be created by the Wabash and Erie Canal, or the Miami Canal, or feeders, or reservoirs therewith connected, and any other lots which may be necessary to supply timber for the construction and repair of the canal, and to furnish the register of the proper land office a list of all such selections, before the day fixed for the sale of any such lands; and such selection shall, thereupon, be entered upon record by the register, and reserved from sale; and the state hereby reserves the right to make the canals through the lands sold, under the authority of this Act, clear of all claims for damages done to said lands."

The legislative Acts quoted from and referred to above, beginning with the Act of 1825 and ending with the Act of March 7, 1842, show very clearly that the promotion and establishment of water powers and the furnishing of lands and water along and from the canals for hydraulic and other commercial purposes to private individuals for such purposes, was a distinct and definite purpose in the General Assembly of Ohio in providing for and constructing the state's canals.

There has never been any cessation of the practice of making such contracts as appellee owns from the beginning of the construction of the canal in 1825 to the present time, over one hundred years.

c. *Leasing of Entire Public Works and Decline of Navigation*: The decline of navigation on the canals must have begun prior to 1861, only sixteen years after the Miami and Erie Canal was completed. On May 8, 1861, 58 O. L. 117 (Appendix, Paragraphs 31 and 43, pages 219 and 248), the General Assembly passed an Act entitled "An Act to provide for the leasing of the public works of the State."

Sections 1 and 11 of this Act are quoted in full in the Appendix, Paragraph 43, page 248. Under Section 1 it was ordered by the General Assembly that the governor, auditor and treasurer of state should lease for the term of ten years from the day of the approval of the bond required by the Act, all the public works of the state consisting of the canals, including the one in question here, and the other public works heretofore named in this brief, together with all side-cuts, feeders, reservoirs, lock houses, collectors' offices, weigh-locks and leases of surplus water, connected with the same and appertaining thereto and owned by the state, "with the right to have additional surplus water," and it provided that all moneys derived from the leasing should be paid into the state treasury.

Section 11 of the Act provided for complete protection of the lessees of water for hydraulic purposes wherever the same might exist along these canals, that is protection against the lessees of the entire public works compelling such lessees of the public works to carry out all the contracts the state had theretofore made with individuals for hydraulic power.

Section 17 of this Act provides as follows:

> "This Act shall take effect on its passage: Provided, that nothing in this Act shall preclude the state from granting permission to the City of Cincinnati, to enter upon, and to improve as a public highway, and for sewerage purposes, all or any of that part of the Miami and Erie Canal, which extends from the east side of Broadway, in said city, to the Ohio River, the state hereby reserving the right to make such grant."

The legislature of the state must have been informed of the fact that navigation was declining for in this Section 17 it specifically reserved the right as against the lessees of the public works as a whole to grant permission to Cincinnati to enter upon and to improve as a public highway and for sewerage purposes that part of the Miami and Erie Canal extending from the east side of Broadway in Cincinnati to the Ohio River.

Thereafter in March, 1863, the legislature passed an Act abandoning to Cincinnati that part of the canal described in Section 17 quoted above and thereafter it passed the other abandonment Acts abandoning various portions of the canal, all of which Acts, nine in number, are described above in this brief.

The first abandonment Act was construed in the *Elevator Company* and *Fox* cases and the second abandonment Act, abandoning the Toledo or north end of this canal, was construed in the *Hubbard* case.

At this point we may add that on April 29, 1872, the legislature passed an Act, 69 O. L. 182, abandoning the north two and seven-eighths miles in length of the Ohio Canal in the City of Cleveland and therein provided for the sale of and thereunder sold such abandoned portion

to Cleveland with power to take, enter upon, improve and occupy as a public highway, *or for other purposes*, and for laying therein gas and water pipes and for sewerage purposes as the Council of Cleveland might determine. This abandonment Act was construed by the Supreme Court of Ohio in the case of the *Cleveland Terminal and Valley Railroad Company et al. vs. The State ex rel.*, 85 O. S. 251, and this is the case which was approved by the Supreme Court of Ohio in the *Middletown* case as determining the rights of the State of Ohio in dealing with its lands in its proprietary or private capacity.

When the General Assembly abandoned the Cincinnati end of this canal it took away therefrom its connection with the Ohio River as an outlet to commerce on that river. When it abandoned the Toledo end it took away from the canal its outlet to the Great Lakes and to any commerce thereon. And so the decline of navigation on this canal continued until, as it is admitted in this case, prior to the year 1894 it had practically disappeared, and when appellee acquired its first lease, the Law lease, navigation had wholly disappeared. Of course it is common knowledge with the people in this country that with the beginning of the development of railroad transportation immediately after the Civir War navigation on inland canals such as the one in question here and the others in Ohio, rapidly declined to complete cessation, and it is also common knowledge among all people that it was not possible to revive or continue such transportation in competition with railroad transportation.

d. *The State Passed to Private Capacity Through Refusal of Public to Use Canals*: From appellants' statement of points on which they will rely it appears that they claim the state could not pass from its status of ownership of the canals in its public or governmental capacity to an ownership thereof in its proprietary or private capacity except by declaration through an act of the law making body of the state, and if they claim that the Act of 1902 (Appendix, Paragraph 42, page 246) is evidence that the state had not intended so to pass and that this Act of 1902 was an attempt to revive navigation on he Miami and Erie Canal, then our answer is that it did not accomplish that purpose. It is admitted in the case that navigation was practically gone before the year 1894 and that it had wholly ceased prior to 1900 and that it has never been revived.

We may cite another instance of what probably was an effort on the part of the state to revive navigation on this canal, namely, the famous "Electric Mule" Act, passed April 25, 1898 (Appendix, Paragraph 41, p. 244). This Act gave authority to the Board of Public Works to grant by lease or permit to any party or parties or company the right to make any experiment with electricity as a motive power for the propulsion of boats or other craft on the Miami and Erie Canal by poles and overhead wires erected for such purpose, or by traction power on the berm banks or towing paths in such manner or under such regulations as the board might direct. The answer to this effort, if so it may be termed, is the same as the answer to the Act of 1902: navigation was gone and it has never been revived.

Further analyzing the Act of 1902, it does declare in

its first section that it was the policy of the state that the Miami and Erie Canal and the northern division of the Ohio Canal with all their water supplies, reservoirs, dams, feeders and adjacent lands should be retained as a public canal, although it does not there say that these canals should be so retained as public canals for *navigation.*

In Section 3 of the Act it declares that the ~~northern~~ southern division of the Ohio Canal from Dresden Junction to Lockbourne, and from Columbus to Portsmouth, and this included the Hocking Canal, should be retained and maintained although in that declaration it does not specifically declare for what purpose; but this Section 3 provides for the appointment of a commission by the governor to make an examination and investigation as to the condition of the southern division of the Ohio Canal, directing said commission to get all the facts bearing upon the question of its improvement, maintenance, its present and future usefulness as a canal and report the same, together with recommendations, to the next General Assembly and this section then provides that:

> "Pending which report the same shall be kept open for navigation."

It will be remembered that this southern division of the Ohio Canal had as one of its parts the Muskingum River.

Section 4 of this Act provides as follows:

> "The said board of commissioners, together with the board of public works, shall within the present year investigate all present water rate contracts on the two lines of canal mentioned in Section 1,

and revise and readjust them upon a fair and equitable bases as to the rents to be paid in the future.

The board of commissioners and the board of public works shall also investigate the water rent contracts upon the lines of the canal mentioned in Section 3, and make a special report to the next General Assembly as to what extent the rates for water rent may be increased."

The two lines of canal mentioned in Section 1 were the Miami and Erie Canal and the northern division of the Ohio Canal. In the light of the admitted fact that navigation had ceased on the Miami and Erie Canal some years prior to 1902, the language of the first paragraph of Section 4 is conclusive that the General Assembly considered the situation as settled that navigation on that canal could not be revived and it is further conclusive that the General Assembly intended to continue and further promote the project of furnishing hydraulic power and therein to get better revenues for the state from individuals with whom it held contracts for furnishing such power. This first paragraph of Section 4 does not declare with respect to this canal that the same should be kept open for navigation as it did declare with respect to the southern division of the Ohio Canal. If the General Assembly had intended that the Miami and Erie Canal should be kept open for navigation, it would have said so. The maxim, *Expressio unius est exclusio alterius* is clearly applicable here. *Walla Walla vs. Walla Walla Water Co.*, 172 U. S. 1, 22; 43 L. Ed. 341, 350. On the contrary, this Section 4 specifically authorized and commanded the board of commissioners and the board of public works to investigate all the then existing water

rate contracts on the Miami and Erie Canal and to revise and readjust them upon a fair and equitable basis as to the rents to be paid in the future. This was an express legislative recognition, ratification and confirmation of all such contracts on the Miami and Erie Canal and it was an express legislative authority and command to the administrative officers, the board of public works, to revise and readjust all such contracts then in existence upon a fair and equitable basis as to the rents to be paid through the future running of such existing contracts. Appellee's contract, the Law lease, was then in that class.

If there was any lack of power in the board of public works, which we deny, prior to the Act of 1902 to write a valid and binding contract, such as appellee's contracts are, for a term of years extending beyond the time when navigation might cease either through failure of the people to use the canals for that purpose or through declaration by legislative act, this Act of 1902 insofar as the Miami and Erie Canal is concerned fully granted such power, and this at a time when Ohio owned this property in its private capacity.

The power granting statutes of 1830 and 1840 giving authority to the board of public works to enter into such contracts as those of appellee, in perpetuity or for a limited number of years at the discretion of the board, were still in force when the Act of 1902 was passed and they remained in force until the year 1917, when they were amended only in that the legislature then provided that such contracts could not thereafter be made for a longer term than twenty-five years. Hence, we say it is easy to see in the light of all the above related circumstances that the Supreme Court in the *Middletown* case could

not come to any conclusion other than that the state since navigation ended on the Miami and Erie Canal has owned and still owns that property in its proprietary or private capacity.

The issue in the *Middletown* case as to how much water the Hydraulic Company was entitled to take from the Middletown feeder and how much the state of Ohio was entitled to use was settled in the case of the *State ex rel. vs. The Middletown Hydraulic Company*, 116 O. S. 26, 27. Therein it was settled that the state was entitled to take 8,000 cubic feet of water per minute and the Hydraulic Company 19,463.50 cubic feet of water per minute.

Admitting that the primary and public purpose of the State of Ohio in constructing her navigable canals was the promotion of water transportation, it must also be admitted that the state systematically provided, as heretofore shown in the brief, for development of hydraulic power and to lease and sell water and lands along and from these canals for hydraulic power and other commercial and industrial purposes. This branch of the business of the state was not and never has been a public business in the sense that canal transportation was a public business. Under the laws of the state it was, of course, the right of every citizen to ship freight upon the canals to their capacity. The business of leasing and selling lands and water for hydraulic power, while clearly it was contemplated by the General Assembly from the beginning as a means of raising revenue through such accommodation to private individuals, was not and never has been such a business of the state as could accommodate any and all citizens in that line. Leasing and selling

water and land for hydraulic power and other commercial purposes could be done only at such points on the canal where such power could be developed and water spared for such purpose while navigation was in force. If there were two individuals at any point where hydraulic power could be developed and wanting such power, the state was not under any obligation to supply both of them to the capacity of the power, or either of them, and if it should see fit to supply either one of them it could sell all of the water available at that point to either one of them without any regard to the other. This is one of the surest tests of a private business. This branch of the business, therefore, was wholly a private business of the state engaged in with such individuals as the state might see fit to deal with on the best terms possible to be obtained through methods of competition even for the purpose of getting money with which to defray the state's expenses in keeping up and operating the canals in public transportation. What was in the beginning, however, the primary purpose, has been defeated and closed. Navigation on the canals terminated through refusal of the people of the state longer to use them in transportation. The Act of 1902 clearly recognized that situation.

Further, the state acquired these canal lands in fee simple, except in a few instances, and when navigation ceased it then owned them through the same title under which it originally acquired them. *Malone vs. Toledo*, 34 O. S. 541; *Ohio vs. Snook*, 53 O. S. 521; *State vs Railway*, 53 O. S. 189. The Act of 1825 provided they should be acquired through title in fee simple. Exceptions are shown by the *Middletown* and *Vought* cases *supra*, and

the Purdy Grant in this case. They were not acquired upon condition that they were to be used in the construction and operation of navigable canals and there were no reversionary clauses in any of the deeds or grants to the state when it acquired lands through deeds or grants, and if it took them through the process of appropriation, it acquired the fee simple title. These lands so acquired do not go back to the original owners, their heirs and assigns of the property through which the canals were constructed, upon the cessation of the state's use of them for navigable canals. Since navigation ceased on these waterways, the state, therefore, has owned these lands and still owns them simply in its proprietary or private capacity.

This court has often recognized the difference between public and private capacities of states and their political subdivisions, and it has pointed out the difference in attendant powers. *S. Carolina vs. U. S.*, 199 U. S. 437, 461-463: 50 L. Ed. 261, 269-270. In this case the State of South Carolina established dispensaries for the wholesale and retail sale of liquor and prohibited sale by other than its own dispensers. The United States thereafter demanded that South Carolina pay the license taxes prescribed by the federal internal revenue laws for dealers in intoxicating liquors. South Carolina paid these taxes to the year 1901. The dispensers themselves had no interest in the sale and received no profit therefrom. The entire profit went to the State of South Carolina. After 1901 South Carolina brought a suit against the government in the Court of Claims asking a refund of all the taxes thus paid. The court, Mr. Justice Brewer writing the opinion, held that the State of South Carolina

was engaged in a private business and not in a business under its public governmental capacity and the conclusion was reached by the court through a consideration of a number of cases decided up to that time determining that municipalities acted in two different capacities, namely, first, a public governmental capacity, and second, a proprietary or private capacity. The court applied the same rules to the State of South Carolina in this case and held the state liable for the tax.

Los Angeles vs. Los Angeles Gas & Electric Corporation, 251 U. S. 32, 38; 64 L. Ed. 121, 127. In this case Section 19 of the constitution of California adopted in 1879 permitted, in any city in California where there were no public works owned and controlled by the municipality for supplying same with water or artificial light, any individual or any company qualified according to the requirements of this section to use the public streets and ways of such city in laying down pipes, conduits, or other necessary equipment and facilities therein for introducing into and supplying the city and its inhabitants either with gas or other illuminating light or with fresh water for domestic and all other purposes, upon the condition only that this should be done under the direction of the superintendent of streets and such general regulations as the municipality might prescribe for damages, and the further condition that the municipal corporation should have the right to regulate charges made by the individual or corporation accepting the grant and building the plant. The Gas Company accepted the franchise extended by Section 19 and established a plant of sufficient capacity to meet the requirements of the City of Los Angeles and its inhabitants in

supplying electricity through a system of poles and wires and other works in the public streets of that city and in pursuance thereof occupied many of the streets thereof.

Section 19 of the constitution of 1879 was amended in 1911 providing that any municipal corporation might establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication; that such works might be acquired by original construction or by the purchase of existing works, including the franchises, or both; that persons or corporations might establish and operate such works, giving such services upon such conditions and upon such regulations as the municipality might prescribe under its organic law on the condition that the municipal corporation should have the right to regulate the charges thereof.

After the Gas Company had constructed its plant and occupied many streets of the city and after the amendment of Section 19 of the constitution, the city passed an ordinance providing for the construction of a municipal plant of its own and therein provided for the removal and relocation of poles and other property in the public streets of the city belonging to the Gas Company when necessary in order that the city might locate and construct and maintain its own electric light system provided for by the ordinance. This ordinance declared the city's system was necessary for the public peace, health and safety.

Suit was begun by the Gas Company in the District Court of the United States, Southern District of California, to enjoin the execution of the ordinance providing for the municipal electric street lighting system in

such way as to trespass upon the Gas Company's lighting system. This court, at pages 38 and 39 of the report, in discussing the question whether the city acted in its governmental, public capacity, or in its proprietary, private capacity, said:

> "The difference in the capacities is recognized and the difference in attendant powers pointed out in decisions of this court."

This court held in the case that the construction by the city of its municipal electric street lighting system was not done in its governmental capacity but in its proprietary or *quasi*-private capacity and that therefore the city was subordinate in right to the Gas Company, which was an earlier and lawful occupant of the field, and it was also held that the city could not consistently with Section 1 of the Fourteenth Amendment to the Constitution as a matter of public right, clear a space for the construction of its own street lighting system by removing or relocating the instrumentalities of the Gas Company's system occupying the public streets under the franchise granted by the Constitution, without compensating the Gas Company, owner of such system, for the rights appropriated.

Russell vs. Sebastian, 233 U. S. 195; 58 L. Ed. 912;

Vilas vs. Manila, 220 U. S. 345; 55 L. Ed. 491;

New Orleans Gas L. Co. vs. Drainage Commission, 197 U. S. 453; 49 L. Ed. 831;

Vicksburg vs. Vicksburg Water Works Co., 206 U. S. 496, 508.

In the *Vicksburg* case the state laws of Mississippi permitted a municipality to make a contract with a Water Works Company, fixing maximum water rates to private consumers for thirty years, and a contract was entered into between the City of Vicksburg and the Water Works Company to supply water to the people for that period at rates prescribed in the contract. Thereafter the legislature passed an Act authorizing the city to build a water works system of its own for supply of the city and its inhabitants. Thereafter an election was held in Vicksburg under the statute which resulted in a vote to build or buy a water works plant of its own. The city repudiated any contract relations with the company and thereupon a suit was started to enjoin construction of the plant. The Vicksburg Water Works Company prevailed in the litigation and Mr. Justice Day, writing the opinion, at page 508 thereof said:

> "That a state may in matters of proprietary rights exclude itself from the right to make regulations of this kind or authorize municipal corporations to do so when the power is clearly conferred, has been too frequently declared to admit of doubt."
>
> Los Angeles vs. Los Angeles City Water Works Co., 177 U. S. 558: 44 L. Ed. 886;
> Walla Walla vs. Walla Walla Water Co., 172 U. S. 1, 7: 43 L. Ed. 341, 344;
> New Orleans Water Works Co. vs. Rivers, 115 U. S. 674: 29 L. Ed. 525.

The difference between the public and proprietary or private capacity of the state is also distinctly recognized and declared in the case of *Railroad Company vs.*

The State, 85 O. S. 251. This is shown by the first and second paragraphs of the syllabus in the report of the case, which are as follows:

> "1. In conducting transactions with respect to its lands the state acts in a proprietary, and not in a sovereign capacity, and being amenable to all the rules of justice which it prescribes for the conduct of its citizens, it will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains.
>
> 2. When land is granted to a city upon a valuable consideration to be used for streets and other purposes, the title will not, in the absence of an express stipulation to that end, revest in the grantor because the land is subsequently used for street and railroad purposes."

This case is quoted with approval by the Supreme Court of Ohio in the *Middletown* case. The facts briefly stated were that prior to April 29, 1872, Ohio was the owner in fee and in possession of a strip of canal land averaging about 100 feet in width and being about 2⅞ miles in length, in the City of Cleveland, constituting the north portion of the northern division of the Ohio Canal. On that day the General Assembly passed an Act (69 O. L. 182) quoted in full in the report of the case, entitled "An Act to authorize the City of Cleveland to enter upon and occupy a part of the Ohio Canal."

Section 1 in substance enacted that the city should be authorized

> "to take, enter upon, improve and occupy as a public highway, or for other purposes, and for laying therein gas and water pipes, and for sewerage purposes, as the city council of said city may determine,"

the strip described,

"but said grant shall be made subject to all outstanding rights or claims, if any, with which it may be in conflict."

The entire public works of the state were at this time under lease to private individuals in pursuance of the Act of 1861 hereinabove referred to.

Section 2 of the Act of April 29, 1872, provided that Cleveland should be liable for all damages consequent upon the vacation and abandonment of the land covered by the Act, and it required Cleveland to deposit with the governor a written release executed by the lessees of the public works relinquishing any rights they might have in the part so abandoned if Cleveland should see fit to occupy such part. It also required Cleveland to deposit a bond securing the performance of an agreement by the city stipulating what it should do as a consideration for the permission to occupy the land, and the Act required that as such consideration the city, before taking possession of the canal or disturbing the use thereof for canal purposes, should at its expense under the direction of the board of public works connect said canal with the Cuyahoga River at the southerly terminus of the portion so to be occupied by the city, procure the right-of-way, make the necessary excavations, embankments, walls, gates and locks needed to connect said canal with said river at the point aforesaid, and remove the present weigh-lock to such place as should be named by the board of public works. (See 85 O. S., pages 253, 254.) The Act further provided that when the city should perform these prescribed duties, the governor should execute and deliver to Cleveland a grant of all the interest of Ohio in said Ohio Canal as above described to be forever used

and occupied by said city for any or all of the purposes before mentioned.

The facts as stated in the report show that the city did perform all of the work above designated (page 265) at a cost of $280,000.00, and that in October of 1879 the governor executed a deed granting to Cleveland the right to use and occupy said lands as its council should determine for any and all of the purposes mentioned upon the terms and conditions of the Act. The city thereafter leased this land to the railroad company and received a consideration of $265,000.00 therefor. In September, 1908, the state instituted action in *quo warranto* to oust the railroad company from further exercise of the alleged right to maintain their tracks upon the property in question. The decisions in the lower courts were in favor of the state, but those decisions were reversed by the Supreme Court of the state as shown by the holdings of that court in the paragraphs of the syllabus quoted above. The opinion was written by Judge Shauck, and at page 298 of the report he says:

> "The making of that substituted connection was a valuable consideration for the grant. It is not intimated that the state was in any way defrauded or even that the legislature exercised an erroneous judgment upon that subject, and yet it is insisted that the state, retaining all that it received in the way of consideration for the grant, may revoke the grant."

In showing the rule which has always been applied by the courts in the construction of grants from the state to individuals in cases of consideration moving from the grantee and in another class of cases where no consideration does so move but the grant is a grant of gift, he

quotes the language of Mr. Justice Story in his dissenting opinion in the case of *Charles River Bridge vs. Warren Bridge*, 11 Pet. 420, 597; 9 L. Ed. 844, as follows:

> "But what, I repeat, is most material to be stated, is that all this doctrine in relation to the king's prerogative of having a construction in his own favor, is exclusively confined to cases of mere donation, flowing from the bounty of the crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases; and the grant is expounded exactly as it would be in the case of a private grant, favorable to the grantee. Why is this rule adopted? Plainly, because the grant is a contract, and is to be interpreted according to its fair meaning. It would be to the dishonor of the government that it should pocket a fair consideration, and then quibble as to the obscurities and implications of its own contract."

It seems to be settled, therefore, that under the decisions of the Supreme Court of Ohio, when navigation ceased on the Miami and Erie Canal, Ohio owned that property in its proprietary or private capacity, and by reason thereof it became subject to the rules declared in the case just considered above and in the *Middletown* case sanctioning and approving the case involving the Cleveland property.

e. *Earlier Cases Distinguished From Middletown Case;* We have said that the *Hubbard, Elevator Company, Vought, Walsh* and *Fox* cases were wholly different in their facts from the facts of the instant case. In each of those cases navigation was still being carried on from the City of Cincinnati to Toledo. The southerly end of this canal in Cincinnati was abandoned by the Act passed in 1863. (Appendix, Paragraph 32, page 221.) This Act was

construed in the *Elevator Company* and *Fox* cases. The northerly end of this canal in Toledo was abandoned by the Act passed March 26, 1864. (Appendix, Paragraph 33, page 223.) This Act was construed in the *Hubbard* case. It will be seen by an examination of these cases that in each one of them the plaintiff had a lease simply permitting him to take a certain amount of water from the Miami and Erie Canal prior to the abandonment Act affecting him. It is clear from a reading of these cases that the only obligation which lay upon the plaintiff in any one of them was the matter of paying to the state the agreed rentals specified in the particular lease, and the Supreme Court of Ohio in each of these cases held that each of the plaintiffs was merely a licensee entitled to take the amount of water from the canal as specified in his lease within such time as the particular part of the canal from which he took the water should be maintained for navigation, notwithstanding the fact, it is true, that the Acts of 1830 and 1840 granted to the board of public works power to sell or lease lands along and waters from this canal for hydraulic purposes upon such conditions as the board might impose and for a limited number of years, or in perpetuity, for an annual rent or otherwise as the board might deem for the best interests of the state. The court in each of these cases assigned as the reason for this rule the fact that if the court should have held otherwise, then the state would have been compelled to maintain at its own expense the portions of the canal so abandoned simply for the purpose of furnishing hydraulic power to the lessee. This shows clearly that the cost and expense of maintenance of the canal or part thereof from which the water was per-

mitted to be taken had not been laid upon the lessee in those cases. In addition, however, in the *Fox* case the Supreme Court held that Fox had no lease because he had abandoned the same and was not entitled to consideration for that reason.

The cases of *Vought and Walsh vs. C. H. V. Railway Company*, 58 O. S. 123; 176 U. S. 478, did not involve any part of the Miami and Erie Canal. They involved a part of the Hocking Canal which formed a part of the southern division of the Ohio Canal. The northern division of the Ohio Canal extended from Lake Erie in Cleveland south to the Town of Dresden on the Muskingum River. The southern division of the Ohio Canal extended from the Town of Dresden on the Muskingum River south along or in the Muskingum River to the Ohio River. A branch of this southern division extended from the Town of Dresden westerly to Lockbourne, just south of Columbus, Ohio, and another branch extended from Lockbourne directly south to the Ohio River at Portsmouth. The Hocking Canal, a part of the southern division, extended along the Hocking River and in between the Muskingum River and the branch of the southern division extending from Lockbourne south to the Ohio River.

There must have been some navigation on the southern division of the Ohio Canal when the *Vought* and *Walsh* cases arose and were decided in 1898 because Section 3 of the Act of 1902 (Appendix, Paragraph 42, page 246) provided that

> "The waters, supplies, reservoirs, dams, feeders and adjacent lands thereto of the southern division of the Ohio Canal from Dresden Junction to Lockbourne and from Columbus to Portsmouth shall be retained and maintained."

It further provided that the governor should appoint a board of commissioners to investigate

> "the conditions of the southern division of the Ohio Canal and all the facts bearing on the question of its improvement, maintenance, its present and future usefulness as a canal, together with all possible information bearing upon this subject, and report the same, together with recommendations, to the next General Assembly, *pending which report the same shall be kept open for navigation.*"

The Miami and Erie Canal was a distinct line of canal and was not connected in any way with the northern or southern divisions of the Ohio Canal. The *Vought* and *Walsh* cases, therefore, have no bearing upon the *Middletown* case, which applied to and involved only the Miami and Erie Canal.

As to appellee's contracts, however, a very different state of facts present themselves. Navigation on the Miami and Erie Canal had practically disappeared prior to the year 1894, and therefore before appellee's principal lease, the Law lease, was written and before appellee acquired that lease with the express consent of the board of public works, navigation had wholly disappeared from the Miami and Erie Canal and it has never been revived. That was practically thirty-five years ago.

The Law lease lays upon the lessee the entire cost and expense of maintaining the part of the canal in question here from the point where it connects with the Maumee River above the Grand Rapids Dam northeasterly to Lock No. 45, about three-fourths of a mile northeasterly of the hydro-electric plant in Maumee. Under this lease appellee, at its own expense, is required to keep in

good order and repair and free from obstructions, all parts of this canal, including the banks, and all devices and works thereof, and in connection therewith and this, of course, includes the Grand Rapids State Dam. After acquiring this lease appellee constructed the water flume from the canal in Maumee southerly to the Maumee River suitable for a hydraulic plant of 400 horse power; acquired land at that point on the river to construct such a plant and thereafter constructed the plant.

Under this lease appellee was paying the state a rental of $500.00 per annum. Thereafter in 1902 the General Assembly passed the Act hereinabove referred to of that year in which in Section 4 thereof (Appendix, Paragraph 42, page 246), the General Assembly of Ohio authorized and commanded the board of public works and the canal commissioners to

> "investigate all present water rate contracts on the two lines of canal mentioned in Section 1 and revise and readjust them upon a fair and equitable basis as to the rents to be paid in the future," the Miami and Erie Canal being one of the canals mentioned in "Section 1."

The Law lease granted to appellee:

> "The use and occupation of all the surplus water of the Miami and Erie Canal between Providence and Toledo not needed for navigation or not now under lease."

After passage of the Act of 1902, appellee acquired the Tryon lease in 1904 granting 58 horse power of water at a rental of $300.00; the Detwiler lease in 1909 granting 40 horse power of water at a rental of $320.00; and in 1910 the reserved water rights under the Purdy per-

petual grant securing to appellee the water reserved in that grant. (Stipulation Exhibit No. 7; R. 82, 95, 101.)

In the month of December, 1910, after the passage of the Act of 1902, appellee entered into the agreement supplementary to the Law lease (Stipulation Exhibit No. 2), under and through which the whole situation between the state and appellee with respect to appellee's water power at Maumee was revised and readjusted, thus forming between the state and appellee a definite plan for this great water power. In that supplementary agreement appellee reassumed the entire maintenance of this canal throughout Lineal Part 2 and the southwesterly end of Lineal Part 1 to Lock 45 and assumed the payment of the wages of three patrolmen to be appointed by the state to guard and protect this property and keep the same in proper repair.

In addition to the above, however, appellee in this agreement agreed to and did dredge this canal throughout its length from the Maumee River at Providence to Lock 45 in Maumee, remove the rock bars obstructing the flow of the water therein and raise the banks of the canal so that it would carry a greater quantity of water.

Appellee's improvement in this way of the state's property was done according to the agreement and at the sole cost and expense of appellee for this work alone of the sum of $53,000.00.

Through this supplementary agreement the state agreed to let into the canal from the pool above the dam in the Maumee River all the water that the canal would safely carry to be used by appellee at the hydro-electric plant in Maumee in the generation of electricity to be supplied to the public for light, heat and power.

Under this agreement the rentals to be paid by appellee were increased $1,500.00 per year absolutely in addition to the rentals called for by the Law lease and increased to an additional $1,500.00 per year if the state should furnish an amount of water without interruption as specified in the agreement.

Immediately upon the acquirement of this supplementary agreement appellee completed the work of the improvement of the state's property as called for by the agreement and thereupon enlarged the water flume from the canal southerly to the hydro-electric plant on the river, to a great flume about 300 feet long, 50 feet across the top, 40 feet across the bottom and 12 feet deep. It, as a part of this flume, laid large iron pipe flumes connecting with the one first described above and descending to the hydro-electric plant, carrying the water in a fall of 61 feet. At the same time appellee enlarged the hydro-electric plant from its former capacity of 400 water horse power to 2700 water horse power with capacity for generating 10,000,000 kilowatt hours of electricity per year, and it installed in the plant in this work modern turbine water wheels, electricity generators and all other equipment necessary to the construction and completion of such larger plant. (Stipulation Exhibit No. 24, R. 168). This work was all done with the knowledge and consent of the state and the plant has been thus operated since such completion and has generated electricity for the purposes aforesaid since such completion. (Stipulation Exhibit No. 14, R. 127.)

After the completion of this plant appellee acquired the Studer lease (Stipulation Exhibit No. 3) in 1913, granting 47 horse power of water at a rental of $450.00

per year, and The Maumee Paper Company lease (Stipulation Exhibit No. 5) in 1912, granting 52 horse power of water at a rental of $400.00 per year. Each of these contracts, the same as the Law lease and its supplementary agreement, imposes upon appellee the entire cost and expense of the canal and all devices and works in connection therewith used in operating the leases.

The detail of terms, provisions and conditions of all these minor leases, except the Purdy grant, have heretofore been shown in the statement of the case.

f. *Detail of the Purdy Grant*: The Purdy grant, Stipulation Exhibit No. 7 (R. 101), was overlooked in the drawing of the bill, and it is brought into the case through Section 4 of the stipulation and agreement between the parties on the evidence and Section 15 of that Stipulation (R. 60, 64). This grant arose out of circumstances and facts as follows:

Prior to March 12, 1845, James Purdy, of Mansfield, Ohio, was the owner of a body of land bounding and abutting on the Maumee River at the Grand Rapids, so-called, thereof, at the Town of Gilead, now the Village of Grand Rapids, Ohio, and at the location of the present Grand Rapids State Dam. By virtue of his ownership of this land he was, of course, a riparian owner on the south side of the Maumee River, and on the land and the river at Gilead, as shown on Stipulation Exhibit No. 25, map of the canal, he had erected and was operating a mill by hydraulic power through water drawn from the south side of the river. At this date Ohio had completed the Wabash and Erie Canal (afterwards designated as a part of the Miami and Erie Canal) from the west Ohio

state line northeasterly to Defiance and on northeasterly along the northerly side of the Maumee River to and through Toledo to Lake Erie in Lucas County. Purdy's hydraulic power was then in existence at Gilead on the south side of the river. During the construction of the canal on the north side of the river the state had constructed the Grand Rapids State Dam running from the north side of the river at Providence to a point on the south side of the river above the location of Purdy's hydraulic power and his mill. Question arose between Purdy and the State of Ohio relative to Purdy's hydraulic power on the south side of the Maumee River, and on March 12, 1845, the General Assembly passed a special joint resolution (Appendix, Paragraph 40, page 241) relative to adjustment of the claim of James Purdy with respect to his water power. This joint resolution gave the board of public works authority

> "to negotiate and purchase of James Purdy the right to which he may be entitled as riparian proprietor to the water which the state may want, flowing in the Miami (Maumee) River at the Grand Rapids, *over* and *above* what she may need for the purposes of the improvement of navigation by her public canals; and in case the said Purdy shall desire to receive the price agreed on in whole or in part in the surplus water of said river, the board shall construct a side-cut from the pool above the State Dam *sufficiently large for the purposes of navigation* and to carry the water to the mills of said Purdy with a suitable guard lock therein, which side-cut shall be *under charge of the board of public works and subject to reasonable tolls*";
>
> "And the board may sell to said Purdy to be taken through such side-cut so much water as shall be agreed on so that there shall at all times

remain to the state water enough for her purposes of *navigation* and to *supply the hydraulic power* which she shall have rented; and any balance due to said Purdy by said agreement shall be paid as damages to others are paid by existing laws for injuries occasioned by construction of the public works."

On December 8, 1845, Purdy executed and delivered and the state received and recorded in Wood County, Ohio, the indenture, copy of which is Stipulation Exhibit No. 7 (R. 101). The preamble of this indenture recites that the state in construction of the canal on the north side of the river had erected a dam across the river a short distance above the property and hydraulic power of Purdy situated on the river for the purpose of diverting the water into said canal as well for navigation as to lease the same for hydraulic purposes, thereby diverting the water from the natural channel and from the hydraulic works of Purdy. The granting clause of this indenture is:

"That the said Purdy for the consideration hereinafter stated releases and forever quitclaims to the State of Ohio, her lessees and assigns, his right and interest as riparian proprietor to the use of the water in the Maumee River flowing over the Grand Rapids, over and alongside of his property in and near the Town of Gilead, in Wood County, Ohio, that is, so much thereof as said state may choose to divert and *lease for hydraulic purposes*, provided that said Purdy reserves and *excepts* from said conveyance and reserves to his own use so much of said water to be taken from the pool of the dam aforesaid through the canal herein described in any quantity he may desire," during certain times of the year and in certain amounts, all of which are then described.

> down to a minimum amount of water, "sufficient to operate six pairs of four and one-half feet millstones, grinding each at the rate of 150 bushels of wheat per 24 hours, together with all machinery necessary in manufacturing flour," etc.

Through the indenture the state, in consideration of the above, agreed to construct a public navigable canal from the pool of the river aforesaid on the south shore of the river to the head of Purdy's mill race in the Town of Gilead and then through that mill race to a point 200 yards below the head thereof and to his mill, 30 feet wide at the bottom and 4½ feet deep below the top of the dam with proper descent at the bottom and proper slope of the banks, and to construct in said canal a guard gate and other fixtures for the security of the navigation and machinery connected with the canal; and

> "The said State of Ohio conveys and guarantees to said Purdy and his assigns forever the right to receive through said canal and use on his own land the foregoing reserved quantity of water."

The state also agreed in this grant to lease no water on the canal on the north side of the river between the pool and the Town of Waterville in addition to that which was then leased, and none on the canal on the south side of the river except what was to go to Purdy under the indenture.

This grant and the rights of Purdy under it and all the circumstances out of which the grant arose, are really parallel with the facts in the *Middletown* case. In this latter case Enoch deeded land to the state to be used in construction of the Middletown feeder and parts of the

canal there, but in his deed expressly reserved his water rights which he had theretofore been enjoying at that point.

The state constructed the navigable canal on the south side of the river, as above provided, through and occupying Purdy's head race on his own lands. The state therefore acquired this land for this south side navigable canal in fee simple, subject only to the right of Purdy to carry the reserved and excepted amount of water specified in his grant to his mill to be used for hydraulic purposes.

This plan accomplished exactly what was accomplished under the plan followed between Enoch and the state in the *Middletown* case.

The board of public works and the General Assembly no doubt considered the joint resolution in question here necessary because the Wabash and Erie Canal (afterwards Miami and Erie Canal) had already been located and constructed on the north side of the river under former enabling acts. (Appendix, Paragraph 22, page 213.)

Appellee acquired the excepted and reserved water rights of Purdy under the Purdy grant in April, 1910, with the consent of the State of Ohio, and in Section 15 of the Stipulation and Agreement on the Evidence (R. 64) it is agreed that since such acquirement by appellee none of the reserved and excepted water under the grant has been taken out of the pool in the Maumee River on the south side thereof but that all of such reserved and excepted water has been and is being diverted in said pool and taken out by appellee on the north side of the river and carried through Lineal Part 2 and

the southwesterly 1.6 miles of Lineal Part 1 to the plant in Maumee. This diversion and use is authorized under the *Middletown* case, 114 O. S. 438, 457, as ruled in the third paragraph of the syllabus, as follows:

> "3. Where water rights are granted for a specified use, or are excepted from a grant for a specified use, in the absence of an expressed intention that the grant or the limitation are for no other use, the specification of the use will not be regarded as a limitation of the character of the use, but only as a limitation of the quantity of the use."

On the trial of the instant case in the court below counsel claimed that the Purdy grant was nothing more than an ordinary lease or sale of water by the state to Purdy differing in no respect in effect from appellee's other contracts. But Purdy never granted to the state all of the water he was entitled to by virtue of his riparian ownership and of course the state never paid him for all of it. It must be presumed that such water as the state took from him for navigation purposes was paid for under the Act of 1825. The resolution provides for that. As a consideration for the water which he granted to the state for the state to use for its own hydraulic purposes on the north side of the river, the state constructed the navigable canal on the south side of the river through Purdy's head race on his own land, and according to the terms of the grant, Purdy, his heirs and assigns, are entitled to draw that amount of water from the south side of the river through said canal in perpetuity.

This is the construction put upon the resolution and the Purdy grant since it was entered into between the

state and Purdy in 1845 and it clearly is ruled by the *Middletown* case.

If counsel fears that appellee claims the right to use the water excepted and reserved by the Purdy grant in perpetuity on the north side of the river in the Miami and Erie Canal, we answer that we make no such claim. None of appellee's contracts run in perpetuity with respect to the Miami and Erie Canal on the north side of the river. The Purdy grant was acquired by appellee with the knowledge and consent of the state simply for the purpose of consummating the situation and plan desired by both the state and appellee, namely, to use all the water that could flow in the Miami and Erie Canal to its safe capacity from the pool above the Grand Rapids Dam to the hydro-electric plant, except the water going into the Milling Company in Toledo and to the Providence Mill at Providence. That result was accomplished when appellee acquired the Law, Studer, Tryon, Maumee Paper Company and Detwiler leases and the Purdy grant and readjusted the whole situation under the agreement and supplementary lease.

Appellee, except for its arrangements with the state of Ohio, could exercise in perpetuity the rights now owned by it under the Purdy grant on the south side of the river, but under the holding in the *Middletown* case it has the right to use the water secured to it under the Purdy grant through and on the canal on the north side of the river so long as it is lawfully entitled to use the canal lands and water therefrom of the Miami and Erie Canal on the north side of the river. The length of time throughout which it may thus use water from the Purdy grant is measured by the terms of appellee's other con-

tracts and the facts, circumstances and law governing its rights against the state under those contracts, including the agreement and supplementary lease. When appellee's rights to use the Miami and Erie Canal lands and draw water through and from the same on the north side of the river shall be terminated, then its right to use water from the Purdy grant through and from that location will also be terminated.

Counsel for appellants, arguing further with respect to the Purdy grant, contended in the court below that

> "The so-called reservations do not purport to be an exception or even a reservation of anything which was in existence at the time of the grant."

Certainly the facts of the case as related above cannot be disputed. They are established by the wording of the resolution and the grant themselves. The mere reading of the language refutes the claim of counsel in this respect and the *Middletown* case establishes the correctness of the construction we place upon it.

On the trial in the court below counsel for appellants on the question here under consideration relied on the case of *Yorkhaven Water & Power Co. vs. Yorkhaven Paper Co.*, 201 Fed. 270. This case is of no benefit to appellants because it is not in its facts at all like the instant case. It arose out of a controversy between two corporations, one a private corporation and the other a *quasi* public corporation. The Paper Company was a land owner on the Susquehanna River and therefore a riparian owner. The Paper Company sold its entire tract of land thus bounding and abutting on the river to the Power Company, with all water rights except as reserved in the selling grant. The Paper Company was not in the

exercise of any water power at the time of the transaction and in fact there was no water power then in operation, or in existence. The Paper Company either retained or already owned a tract of land far removed from the river, and in making this sale of its riparian land it was provided that the purchasing Power Company should create a water power at some point on the river and make arrangements to flow a certain amount of water forever to the Paper Company on its land far removed from the riparian land, as described above. The agreement between the parties provided that if the Power Company should ever fail to furnish the amount of water stipulated for in the agreement, then damages should be paid by it to the Paper Company for such failure. The Power Company was a *quasi* public corporation using water power in connection with the riparian land which it had purchased, as stated above, from the Paper Company in the generation of electricity, which was supplied to the public for light, heat and power purposes. It appears from the facts of that case that if the Power Company should continue to furnish water to the Paper Company for hydraulic power, the Power Company would not be able to operate its hydro-electric plant and fill its contracts for electricity to the public, and it further appeared that if it should attempt to do so, the Power Company would be made insolvent and could not go on with its business at all. The court held that under those circumstances even an injunction should not be granted, but the court further held that it was a complete defense to the suit for injunction that the agreement provided an adequate remedy at law to the Paper Company, in that it was provided in the agreement that if the Power

Company did not furnish the water to the Paper Company for hydraulic power, the Paper Company would have its action for and could collect damages for such failure. We fail to see how this case can be of any comfort to counsel for appellants in the instant case.

g. Right of State to Abandon Without Compensation Not Stare Decisis: In the court below appellants contended that:

> "The power of the state to abandon the part of the canal in question here has become *stare decisis.*"

Thus broadly stated, counsel for appellee emphatically dispute the proposition.

We have at all times insisted that the *Hubbard, Elevator Company* and *Fox* cases and other similar cases on which appellants rely must be construed as applying only to the specific facts of those cases respectively.

We have always contended that the facts and circumstances of appellee's contracts are wholly different from any and all the cases upon which appellants rely, and that if the *Middletown* case had never arisen, then and in that event even all the equities in such a controversy as this would be with the appellee and the court would be bound to recognize those equities and enjoin the state authorities from taking the water away from appellee until the state should have made proper compensation to appellee for its property rights. We made this claim in the case of *The Maumee Valley Electric Company vs. Toledo*, 13 Fed. 2d 98, on the theory and ground and fact that navigation on this canal had been wholly abandoned before appellee acquired any of its contracts and that the state had passed from the owner

ship and control of these lands in its public or governmental capacity to ownership in its private or proprietary capacity, and that in dealing with them the state must be governed by the same rules as govern private individuals in like transactions.

Then, on that particular question, which as Judge Robinson said was then to be decided for the first time with respect to the Miami and Erie Canal property, came the *Middletown* decision which fully sustains and confirms our claim with respect to the property in question and the facts of the instant case. The United States Circuit Court of Appeals, 13 Fed. 2d 98, 102, *supra*, in their opinion said it was unnecessary for that court in that case to decide the immediate question now being discussed, but that since that case had been argued the *Middletown* case had been decided and that that case does lend substantial support to the proposition for which we contend.

The rule in Ohio that the state with respect to the canal and waters therein of the Miami and Erie Canal had passed from its public governmental capacity in the ownership thereof to its private and proprietary capacity in such ownership, was established in the *Middletown* case and is *stare decisis*, and therefore rules the instant case in favor of appellee because the facts on that question in that case and in the instant case, as made by the pleadings and proof, are the same. Counsel for appellants did not meet the questions of difference in facts between the cases on which they rely and the instant case; they did not even discuss those differences although they of course knew them full well.

The power of the State of Ohio as an abstract prop-

osition to abandon any canal in a proper case has never been disputed by anybody so far as we are advised, and it certainly is not disputed by us; but the rules declared in the earlier cases cannot stand as *stare decisis* controlling the instant case growing out of facts and circumstances wholly and essentially different from the facts and circumstances of any of those cases. So that the power of the state to abandon any canal as an abstract proposition is not the question here.

The question here is: Does the state under the facts and circumstances of the instant case have the power to abandon this canal for hydraulic purposes, take the water out of the same, deprive appellee of the use of these canal lands and the water therein under its contracts and leave appellee wholly without remedy against the Act, the enforcement of which appellee in this suit seeks to enjoin? If counsel claim that the power of the state is so broad as that, then we say the question has not become *stare decisis*. No case has been decided on a state of facts and circumstances such as are involved in the instant case. It is true that *stare decisis* is

> "To abide by or adhere to decided cases,"

where the same points come again in litigation under the same or similar facts and circumstances. But it was decided long ago by this court in the case of *Brooks vs. Norbury*, 11 Wheat. 80, 90, 91; 6 L. Ed. 423, 426, that a decision or

> "opinion in a particular case founded on special circumstances, is not applicable to cases of circumstances essentially different."
>
> Northern Pacific Railway Co. vs. North American Telegraph Co., 230 Fed. 347, 359, 360.

It has never been decided by any court that any rule of law declared in any case upon a particular state of facts would or should stand as *stare decisis* in another case based upon facts and circumstances essentially different from those in which the rule in question was established. This is elementary, especially in equity jurisprudence, and we deem it unnecessary to burden the court with the hundreds of cases which might be cited in support of our statement.

Further, counsel in the court below attempted to apply to the controversy here the case of *State ex rel. vs. Board of Public Works*, 42 O. S. 614. That case was not only wholly unlike the instant case but wholly unlike any of the other cases upon which they relied. That was the case of a lease in which a reservation clause had been inserted in accordance with Section 6 of the Acts of 1830 and 1840 giving power to the board to make leases. This Section 6, still in force, provides that every lease must contain a reservation that if the state or its agent should at any time deem it necessary to resume the use of the water leased and use it in the interest of *navigation*, then such resumption might be had, and the statute further provides that in case of such resumption in whole or in part, the sum paid for the lease by the lessee or the rent reserved or a reasonable portion thereof should be refunded or remitted to the lessee, his heirs or assigns. The board of public works attempted to go further in the lease in question in that case and provided that in case the board should at any time so resume the water leased, then the board of public works would pay to the lessee the value of any lasting improvement erected for the use of such water.

The State Supreme Court in passing on the case held that the board in attempting to make an agreement that it would pay the lessee for such improvements was going beyond its powers and held that under the statute it was the public duty of the board to resume the water leased at any time when needed for the public use of navigation untrammelled by any condition or any right of the lessee to prevent it.

There are no such facts, circumstances or conditions involved in the instant case. The only thing the state has to do in the instant case is to receive its largely increased rentals of a greatly bettered property made so at the cost and expense of appellee by reason of the contracts in question here.

h. *Consummation of Plan by State for Great Water Power at Maumee*: Now after the acquirement of appellee's principal lease, the Law lease, Stipulation Exhibit No. 1, laying the entire cost and expense of maintenance of the entire canal in question here upon appellee, free of cost and expense to the state; after the passage of the Act of 1902 giving express authority and commanding the board of public works to readjust and revise all water contracts on the Miami and Erie Canal; after acquirement by appellee of the Tryon lease in 1904, the Detwiler lease in 1909, the acquirement of the excepted and reserved rights under the Purdy grant in 1910, and the making of the supplementary lease and agreement between appellee and the state direct under which appellee's contracts acquired up to that time were revised and readjusted in pursuance of the command of the Act of 1902 and under which supplementary agree-

ment appellee reassumed the entire cost and expense of complete maintenance of the canal in question here, free of cost and expense to the state, and in addition thereto actually improved this property of the state by removing rock bars and other obstructions from the canal and raising its banks, deepening and widening the same throughout Lineal Part 2 and the southwesterly part of Lineal Part 1 to Lock 45, such deepening and widening and raising the banks of said canal costing appellee for that work alone the sum of $53,000.00, appellee then in accordance with the plainly evident plan between the state and appellee acquired the Studer and Maumee Paper Company leases.

This consummated the plan between the state, acting through its board of public works, duly authorized under the Statutes of 1830, 1840 and 1902, and appellee to create a water power at the Village of Maumee, Ohio, to the operation of which there should be devoted all the water that the canal would carry to its safe capacity, to be drawn from the pool of the Maumee River above the Grand Rapids State Dam down through Lineal Part 2 and the southwesterly end of Lineal Part 1 to the hydro-electric plant constructed there by appellee for the use of the water, except such water as is used under the Peter Minor perpetual grant in operating the Providence mill at Providence, and the water used under the contract with The Toledo Grain and Milling Company in the operation of its mill at the north end of Lineal Part 1 on Swan Creek, the Milling Company contract being Stipulation Exhibit No. 10 (R. 116).

The Peter Minor perpetual grant appears in Stipulation Exhibits Nos. 8 and 9 (R. 104, 110). This is the

grant involved in the case now before this court of *Kirk et al., Appellants, vs. The Providence Mill Company, Appellee*, Case No. 675, October Term, 1928, and this grant in its circumstances is parallel to the facts of the *Middletown* case and the Purdy grant in the instant case.

The Acts of 1830 and 1840 were in full force before the conception of the plan, and they remained in full force to the year 1917. Under their terms they expressly authorized the board of public works to sell or lease lands along and water from this canal for a *limited number of years* or in *perpetuity* for hydraulic purposes if not needed for *navigation*, upon such conditions and reservations as the board might consider necessary and proper for a certain annual rent or *otherwise* as they might deem most beneficial for the interests of the state. They were amended in 1917 only by provision that thereafter such contracts should be made for a term not exceeding twenty-five years. Appellee's contracts were all written under those statutes except the lease and agreement supplementary to the Law lease, which was written under those statutes *and* Section 4 of the Act of 1902 authorizing and commanding the board of public works to revise and readjust all such contracts then in existence on this canal for the future running of the terms of such contracts.

Navigation on this canal had wholly disappeared some years before the passage of this Act of 1902 and yet the General Assembly of Ohio did not repeal or limit the power granting statutes of 1830 and 1840 in any respect. On the contrary, the Act of 1902 in effect recognizes, ratifies and confirms all such contracts with respect to this canal written under those early laws of 1830 and

1840 and commands a readjustment of such contracts for the future running of their terms. The execution and delivery of appellee's agreement and supplementary lease and the performance by appellee of its obligation thereunder assumed, greatly to improve this property of the state at great cost to appellee, effected such readjustment and revision of all appellee's contracts with the state.

The statutes of 1830 and 1840 do not require the consideration moving from the lessee for the lands or the water to be only an annual money rent but such consideration may, under the terms of these Acts, be a certain annual rent *or otherwise*. Under these statutes and the Act of 1902 the state, through its board of public works, exacted not only largely increased annual rentals in money from appellee but required it to assume the entire cost and expense of the maintenance of this canal, including its banks and all devices and works in connection therewith, from where it connects with the Maumee River above the Grand Rapids State Dam northeasterly throughout Lineal Part 2 and the southwesterly portion of Lineal Part 1 to Lock 45, and in addition to the above, required appellee greatly to improve this property of the state in the manner and at the cost heretofore stated.

As further conclusive evidence of the conceived plan heretofore mentioned, we here call attention to the fact that the water reserved under the Purdy grant was to be used, according to the terms of that grant in operating a water power on the south side of the river at Grand Rapids; the water to be used under the Studer lease was to be used in a water power at Waterville, Ohio, on Lineal Part 2, six miles up the river from the hydro-electric

plant, and the water to be used under the Tryon and Maumee Paper Company contracts, respectively, was to be used at different points in the Village of Maumee but above and southwesterly from the hydro-electric plant on Lineal Part 1; the water to be used under the Detwiler lease was to be used above Lock 45 at such point as the parties or their assigns might agree upon, on Lineal Part 1.

Under the readjustment, therefore, through the agreement and supplementary lease, it is plain that the state meant to permit appellee to bring all the water called for by the Purdy grant from the pool of the river above the dam down throughout Lineal Part 2 and Lineal Part 1 to the hydro-electric plant and that it meant also to permit appellee to bring the water called for by the Studer lease from Waterville down to the plant, and the water called for by all the other minor leases over this property from the points where they were originally intended to be used to the hydro-electric plant, thus giving to appellee an easement and right-of-way over all of Lineal Part 2 and the southwesterly 1.6 miles of Lineal Part 1 for the carriage of all this water from the pool of the river above the dam.

Appleby vs. N. Y., 271 U. S. 387, 388: 70 L. Ed. 1002;
Middletown case, 114 O. S. 438, 457.

Of course it was known to the state when the Act of 1902 was passed that navigation on this canal had disappeared years before and that it never could be revived and under these circumstances we cannot reach any other conclusion but that the General Assembly in passing the

Act of 1902 must have intended to give the board of public works authority to and contemplated that it would or might turn this whole canal, waters in the pool above the dam, the dam itself, the canal lands and all works and devices thereof, over to some individual, persons or corporations in practically the same way in which the whole public works were turned over to lessees under the Act of 1861.

Reading the Acts of 1830 and 1840 together with the Act of 1902, in view of the fact that the former Acts were never amended until 1917 and then only as to the time to run of such contracts, we cannot escape the conclusion that the General Assembly, sensible of the fact that navigation on this canal had ceased never to be revived, purposely allowed the earlier power granting Acts to stand in their broad terms, recognized, ratified and confirmed all contracts written under them with respect to this canal and permitted the board of public works through the power granted in Section 4 of the Act of 1902 to revise and readjust all such contracts so as to bring to the state the best possible results that could be secured through such readjustment.

The Milling Company lease, Stipulation Exhibit No. 10 (R. 116), lays upon the Milling Company the duty and obligation of maintaining the canal as used by it, free of cost and expense to the state.

The sum total of the situation therefore is that under these statutes the state has leased this canal to appellee and the Milling Company as completely and to the same effect as it leased the entire public works under the Act of 1861. It thus has dealt with these lands in its propri-

etary or private capacity in the same way that it dealt with the lessees of the public works with respect to them.

In deciding the *Hubbard* case, 21 O. S. 379, the Supreme Court of Ohio declared that the state had acted in its private capacity when it leased the entire public works to individuals. The court does this in plain language on page 399 of the report, as follows:

> "When the statute was passed authorizing the abandonment of the canal to the City of Toledo, the lessees of the public works were in actual possession of it, under the Act of May 8, 1861, and the lease executed in pursuance thereof, and by which they were empowered to hold, maintain and operate the same, and appropriate its revenues. To this extent, the body of the canal had become, for the time, the private property of the lessees, of which they could not be divested by the state, without impairing the obligations of their contract. This lease was an 'outstanding right and claim' which could not be lawfully defeated by an Act of abandonment, and with which it would necessarily conflict."

Plaintiff Hubbard in that case, according to the decision, was simply a licensee permitted under his lease to take a certain amount of water from the canal before its abandonment north of Lineal Part 1. It appears plainly from the case that he was not under any obligation to maintain the canal and that if the court in that case had held otherwise than it did, then the state would have been compelled to bear the cost and expense of keeping up the canal simply to furnish the water to Hubbard for his hydraulic power. Furthermore, navigation was then in existence on the canal from Toledo to Cincinnati. Appellee, however, under its contracts, stands in a wholly

different relation with respect to this property. It stands in the same position in which stood the lessees of the entire public works. It not only maintains this canal and all the devices and works thereof solely at its own cost and expense but it made a much better property of it through expenditure of its own money to the amount of $53,000.00, all under authority duly given by the General Assembly of Ohio to the board of public works to make such an arrangement, and this after the state had passed from its public to its private capacity in the ownership and control of the property.

In the *Cleveland* case, 85 O. S. 251, the General Assembly provided for a sale of the north 2⅞ miles of the Ohio Canal in Cleveland and as a consideration to move from Cleveland to the state it provided that the city should at its own expense and under the direction of the board of public works connect the canal with the Cuyahoga River at or near the southerly terminus of the portion to be deeded to the city, procure the right-of-way, unless the same should be owned by the state, at the desired locality, make the necessary excavations, embankments, walls, gates and locks needed to connect said canal with said river at the point aforesaid, etc. It was not required to pay any money direct to the state. The Supreme Court of Ohio held that in that sort of a transaction with respect to its lands the state acted in a proprietary and not in a sovereign capacity and that it must be governed by and be amenable to all the rules of justice which it prescribes for the conduct of its citizens and that it will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains.

The instant case differs from the *Cleveland* case only

in that instead of getting a title in fee simple to the property here in question, appellee is given complete ownership and control thereof for a period of years and as a consideration therefor it was required to make of the property at its own expense a greatly better property.

Appellee is not seeking in this case to prevent the state from devoting this property to some other use, even a public use. It is only insisting that it entered into valid contracts with the state, the latter acting in its private and not in its sovereign capacity, and appellee insists that if the state now desires to take away all of appellee's rights under those contracts, put it off the property after it has spent a large amount of money in improving the same at the request of the state, then it should be compensated for its property rights under such contracts.

Appellants in the court below contended that the legislative Act in question here is, because of its terms, conclusive that the state had never passed from ownership and control of those lands in its governmental or public capacity to an ownership and control of them in its proprietary or private capacity. They said that was true because the Act declares that the state intends to retain title to this property for the purpose of devoting it to a public highway—not for navigation but for vehicular travel by land. Appellants making that claim made the further claim that since the Act declares that the state intends in the future to devote the property to a public highway, then it was within the power of the legislature acting in its public or governmental capacity to declare all contracts, such as the contracts of appellee, to be null,

void and of no effect, without making any provision for compensation to the owners of such contracts.

The doctrine declared in the *Middletown* case, however, renders such contention wholly untenable. It would not be contended by anybody that the state would be without power to devote this property again to public highway purposes after it shall have extinguished the rights of appellee through regular and lawful procedure, by amicable arrangement or under the power of eminent domain, and through such procedure have given adequate compensation to appellee in exchange for its rights under its contracts. The state, however, will not be permitted to make such contracts with its citizens acting in its proprietary or private capacity and then free itself from its contract obligations by a simple legislative declaratory Act that it means to go back to the ownership of the property in its governmental or public capacity.

i. ***Appellee's Contracts Are Within Protection of Constitution Regardless of the Middletown Case:*** The question here is as to the nature and extent of the right acquired by appellee under its contracts with the state. This question, in view of the fact that appellee is invoking the protection of Section 10 of Article I of the Constitution of the United States, and Section 1 of Article XIV of the amendments thereto, this court will determine for itself.

Bank vs. Skelly and
Appleby vs. New York, *supra*.
Russell vs. Sebastian, 233 U. S. 195, 202; 58 L. Ed. 912, 920.

The court below, discussing the question as to whether appellee's contracts are contracts within the contract and due process clauses of our Federal Constitution (R. 173 to 176), used the following language:

> "The wisdom of the plan conceived by the early fathers of building a system of water highways over the state 'to promote the agricultural, manufacturing and industrial interests of the state' at its formative period, and the operation of the same as a great vehicle of transportation for fifty years, was entirely justified by the unprecedented development and growth of the state and its industries during that time.
>
> The year 1863 marked the beginning of a series of Acts of the General Assembly abandoning various sections of the canal 'for canal purposes.' This legislative surrender of portions of the canal and the authorization of the use thereof for other purposes, gave rise to litigation in connection with the intervening rights of individuals holding water rights.
>
> Navigation was of course the prime object and original main purpose in the building of the canals. It was a public purpose and exercised by the state in its governmental and sovereign capacity. During the time of the operation and use of the canals for transportation purposes, the use of water for hydraulic power purposes was merely incidental and subordinate to the main purpose. It accordingly became the established law, that when it became inexpedient or inadvisable to continue the canal for navigation purposes, or when some other public purpose, though local in nature, became more important, that part so affected might be abandoned without regard to and notwithstanding the water power leases.
>
> Hubbard vs. Toledo, 21 O. S. 379;
> Elevator Co. vs. Cincinnati, 30 O. S. 629;

Fox vs. Cincinnati, 33 O. S. 492: 104 U. S. 783, 785;

Vought vs. Ry. Co., 58 O. S. 123;

Compare, Kaukauna Co. vs. Green Bay, etc., 142 U. S. 254, 282;

Hoagland vs. Ry. Co., 111 Ind. 443.

The sale of surplus water, subordinate in the first instance and for many years thereafter to the primary purpose and use of the canals, gradually became a contributor to the accomplishment of the main purpose of 'promoting the agricultural, manufacturing and industrial interests of the state' in the development of hydraulic power. It becomes obvious that this element of the state's business has become important when we consider that it has gone on without interruption, paralleling the business of navigation until that business outlived its usefulness, and continuing for thirty years thereafter as the chief if not the sole use to which the canals have been put, and returning to the state a revenue of eighteen millions of dollars—nine millions of which were derived from water rentals of the Miami and Erie Canal alone. The revenue itself indicates a business of substantial proportions, to which private capital of necessity was attracted in the building and enlarging of power plants, and in which corresponding property rights and vested interests have become involved.

All the leases herein involved were made pursuant to authority given by Act of the General Assembly in 1840. This statute remained unchanged until its amendment in 1917, and was recognized as meeting all modern requirements by its incorporation in the General Code of Ohio in 1910. Sections 14009, *et seq.*, Ohio General Code; 38 O. L. 87. The leases were also made subsequent to the time that travel and transportation

by canal had become too slow for the then modern conditions. The position of the state had changed from that of operating the canal as a navigable highway, to the operation of a great power plant for the sale of power and water to the public. *State ex rel. vs. The Middletown Hydraulic Co.*, 114 O. S. 437.

Viewed in the light of changed and altered circumstances brought about by modern progress and development, facts and situations basically the same may assume a new and different aspect. The relationship between the state and the lessees and grantees of water rights, in defining their respective rights, may call for solution differently, if the altered or changed condition warrants. When engaged in the business of contracting water privileges for the manufacture of power and energy as a principal business, the state acted in its proprietary capacity. It is a commercial proprietor, bound in its contractual engagements the same as individuals. *State ex rel. vs. Middletown Hydraulic Co., supra.* That a state or subdivision thereof may act in such capacity, and when so doing is amenable to all the rules of law which bound private individuals, is well established in Ohio and elsewhere.

South Carolina vs. U. S., 199 U. S. 437;

Vicksburg vs. Vicksburg Water Works Co., 206 U. S. 496;

Los Angeles vs. Gas and Electric Corporation, 251 U. S. 32;

State, ex rel. vs. Middletown Hydraulic Co., supra;

State vs. Executors, 3 O. S. 309;

R. R. vs State, 85 O. S. 251.

> The leases and grants owned by the plaintiff are subject to a present day construction and interpretation in relation to the surrounding facts and circumstances in harmony with the present relationship of the parties. Ordinarily such writings are considered contracts. The state we may now say in its proprietary capacity has treated them as contracts in accepting rentals, making new leases, contracting with lessees and owners for improvements, permitting the plaintiff to expand its plant by extensive improvements, and permitting the Law lease to be renewed under its own terms. Believing as we do that they assume the dignity of contracts, little difficulty is found in the solution."

Appellee's contracts have all the elements of a contract in the ordinary acceptance of the term. Under the facts and circumstances of those contracts many of the decisions of this court are applicable in favor of appellee's contention that the Act here in question impairs the obligation of said contracts and that if said Act shall be permitted to be executed and enforced, it will deprive appellee of its property under said contracts without due process of law.

Fletcher vs. Peck, 6 Cranch 87, 136, 137; 3 L. Ed. 162.

In the case of Fletcher vs. Peck, the State of Georgia in its early history had become the owner of a large tract of land within her territorial limits. The title is traced in the statement of the case, 6 Cranch 95-114, from the Crown of Great Britain to that state.

On the 7th of January, 1795, the Legislature of Georgia passed an Act authorizing the sale of certain portions of the lands to individuals calling themselves

respectively the Georgia Company, the Georgia Mississippi Company, the Upper Mississippi Company and the Tennessee Company. Certain of the lands were sold to these parties and thereafter Peck purchased and became the owner succeeding the original grantee in the chain of title of certain of these lands. Peck then sold and deeded a portion of the land so acquired by him to Fletcher and the deed from Peck to Fletcher carried covenants of good title in Peck. Thereafter on February 13, 1796, the Legislature of Georgia (pages 89, 90) passed another Act declaring the Act of January 7, 1795, to be null and void. The Act of February 13, 1796, in express terms declared that the Act of January 7, 1795, was an "usurped Act" passed under a pretended title, and in doing this the latter Act used the following language:

> "That the said usurped Act passed on the 7th of January, 1795, entitled, etc., be and the same is hereby declared null and void and the grant or grants, right or rights, claim or claims issued, deduced or derived therefrom or from any clause, letter or spirit of the same or any part of the same, is hereby also annulled, rendered void and of no effect; and as the same was made without constitutional authority and fraudulently obtained, it is hereby declared of no binding force or effect on this state or the people thereof but is and are to be considered both law and grant as they ought to be *ipso facto* of themselves void and the territory therein mentioned is also hereby declared to be the sole property of the state subject only to the right of treaty of the United States to enable the state to purchase under its preemption right the Indian title to the same."

Other sections of the later Act direct the enrolled earlier law, the grant and all deeds, contracts, etc., relative to purchases made under the earlier Act to be expunged from the records of the State.

It was claimed as facts in the case that the Act of January 7, 1795, authorizing the sale of these lands was passed because of promises and assurances made by three individuals to the members or certain members of the Legislature of Georgia that if such members would assent to and vote for the passing of the Act permitting such sales and if the Bill should become a law, such members should have a share of and be interested in all the lands which the three individuals making the promises and their associates should purchase of the state under authority of the Act; and it was claimed that these promises influenced members of the Legislature and that under such influence they voted for the passing of the Bill into a law. By reason of these facts it was claimed in the case that the Act of January 7, 1795, was a nullity, absolutely void and of no effect whatever.

After the nullifying Act of February 13, 1796, was passed, Fletcher instituted an action in the Circuit Court for the District of Massachusetts, an action upon the covenants of Peck in his deed to Fletcher, claiming in substance that the Act of February 13, 1796, had nullified his title to the property conveyed to him by Peck. Peck acquired his title to the lands not direct from the State of Georgia but from a prior grantee of the state and as the court said (page 132), he therefore was an innocent purchaser without knowledge of any claimed fraud in the Legislature of the State in passing the Act of January 7, 1795.

In the instant case appellee acquired all of its contracts, except one, from prior grantees of the state, but this was done with the consent of the state through resolution by the board of public works expressly permitting the assignments. The supplementary lease and agreement, Stipulation Exhibit No. 2, was granted direct to appellee by the state through the board of public works under authority of the Acts of 1830, 1840 and Section 4 of the Act of 1902.

Mr. Chief Justice Marshall wrote the opinion of the court in *Fletcher vs. Peck*, and in discussing the limitations of the Federal Constitution on the power of the Legislature of Georgia, he used language (page 136) wholly appropriate for adoption in the instant case, as follows:

> "The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American Union; and that Union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The Constitution of the United States declares that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.
>
> Does the case now under consideration come within this prohibitory section of the constitution?
>
> In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

The facts and rulings of this leading case are well known to the court and we will not extend the brief by reciting them further here, but we cannot refrain from calling to the special attention of the court its language in the opinion so pertinent to the instant case, as follows:

> "A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do a particular thing; such was the law under which the conveyance was made by the government. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding upon the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. If, under a fair construction of the constitution, grants are comprehended under the term 'contracts,' is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed. Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and

that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves, and their property, from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state."

Dartmouth College case, 4 Wheaton 518, 641, 644, 654; 4 L. Ed. 629.

In this case this court held as follows:

"The charter granted by the British crown to the trustees of Dartmouth College, in New Hampshire, in the year 1769, is a contract within the meaning of that clause of the Constitution of the United States, Article I, S. 10, which declares that no state shall make any law impairing the obligation of contracts. The charter was not dissolved by the Revolution.

An Act of the state legislature of New Hampshire altering the charter, without the consent of the corporation, in a material respect, is an act impairing the obligation of the charter, and is unconstitutional and void."

The Act in question here attempting to declare appellee's contracts with the state null and void, is a clear violation of Section 1 of the Fourteenth Amendment to the Constitution.

Los Angeles vs. Los Angeles Gas and Electric Corporation, 251 U. S. 32, 35, 38, 39, 40; 64 L. Ed. 121, 127.

The Act certainly contains none of the elements or principles of due process of law. Without any regard

for appellee's property rights, its great investment under said contracts, its large contribution to the improvement of the state's property, its faithful adherence to and compliance with every term, provision and condition provided in said contracts for it to comply with, and without making any provision whatever for compensation to appellee or reimbursement for its great loss that would be occasioned by the execution of the Act, the General Assembly of Ohio arbitrarily, without giving appellee any right to be heard in any form in any forum, attempts to declare appellee's contracts null, void and of no effect. So far as this Act is concerned, it offers to appellee no remedy whatever.

In this court under the bill of rights of the Constitution of the United States it cannot avail appellants any comfort as to what the earlier cases on which they rely decided. The facts are that the state entered into one of these contracts direct with appellee and consented to its purchase of the others; and the Act now in question attempting to abrogate, violate and annul such contracts certainly does violate and impair the state's obligations thereunder and does attempt to deprive appellee of its property without due process of law.

Louisville Gas Co. vs. Citizens' Gas Light Co., 115 U. S. 683, 688, 696, 698; 29 L. Ed. 512;

New Orleans Gas L. Co. vs Louisiana L. and Heat Co., 115 U. S. 650, 672; 29 L. Ed. 516, 524;

C. B. & Q. R. R. Co. vs Chicago, 166 U. S. 226, 234, 235, 237, 238, 239; 41 L. Ed. 979, 983;

New Orleans Water Works Co. vs. Rivers, 115 U. S. 674, 679, 680, 681; 29 L. Ed. 525.

The protective provisions of the United States Constitution invoked here apply to all agencies of the state whether legislative, executive or administrative.

C., B. & Q. R. R. Co. vs. Chicago, 233, 234, *supra;*

Raymond vs. Chicago Union Traction Co., 207 U. S. 20, 35, 36; 52 L. Ed. 78;

Home Telephone and Telegraph Co. vs. Los Angeles, 227 U. S. 278, 290, 291; 57 L. Ed. 510.

In deciding the case of *Russell vs. Sebastian*, 233 U. S. 204, Mr. Justice Hughes, delivering the opinion of the court on page 204, said, under the facts of that case:

> "That the grant resulting from an acceptance of the state's offer constituted a contract and vested in the accepting individual or corporation a property right protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court."

The justice then cites among others the following cases:

Walla Walla vs. Walla Walla Water Co., 172 U. S. 1, 9; 43 L. Ed. 341, 345;

Louisville vs. Cumberland T. & T. Co., 224 U. S. 649, 663, 664; 56 L. Ed. 934, 940, 941;

Grand Trunk Western R. Co. vs. So. Bend, 227 U. S. 544, 545, 552, 556; 57 L. Ed. 633, 639; 44 L. R. A. (N.S.) 405;

Owensboro vs. Cumberland T. & T. Co., 230 U. S. 58, 64, 65; 57 L. Ed. 1389, 1393;
Boise Artesian H. & C. Water Co. vs. Boise City, 230 U. S. 84, 90, 91; 57 L. Ed. 1400, 1406.

In the case of *William F. Hayes vs. Port of Seattle,* 251 U. S. 233, 237; 64 L. Ed. 243, Hayes filed a bill in equity for an injunction to restrain the enforcement of an Act of the legislature of the State of Washington approved March 11, 1913, on the ground that the Act impaired the obligation of (a) an existing contract between him and the state in violation of Section 10 of Article I of the Constitution of the United States, and (b) that it deprived him of property without due process of law contrary to Section 1 of the Fourteenth Amendment. Under an Act passed in 1893 provision was made for the excavation by private contract of waterways for the uses of navigation, and under that Act the plaintiff obtained a contract with the state through the commissioner of public lands. The contract provided for the excavation by the plaintiff of a waterway in Seattle harbor extending from the outer harbor line to the head of Smith's Cove. Plaintiff was to be paid the cost of the work plus 15% and interest, for which he was to have a lien upon the tide and shore lands filled in by the material taken out in excavating the waterway. The state agreed to hold these lands subject to the operation of the contract pending its execution subject to the ultimate lien of the contractor thereon and that it would perform all things required by the Act of 1893 to be performed by the state. There was dispute over the specifications and the work

did not go on. Thereafter the Act of 1913 was passed providing that the waterway should be vacated and title to the land vested in the Port of Seattle. Plaintiff was advised of this legislative measure prior to its enactment. After its enactment the port commission of Seattle took possession of the waterway, exercised control over it and did a great amount of excavation, filling and bulkhead construction. The plaintiff then began his suit, and deciding the case this court said:

> "Upon the first constitutional point, it is important to note the distinction between a statute that has the effect of violating or repudiating a contract previously made by the state and one that impairs its obligations. Had the legislature of Washington pending performance, or after complete performance by complainant, passed an Act to alter materially the scope of his contract, to diminish his compensation or to defeat his lien upon the filled lands, there would no doubt have been an attempted impairment of the obligation."

Then the court says that:

> "The legislation in question had no such purpose or effect. It simply after seventeen years of delay without substantial performance of a contract, provided that the project should be abandoned and title to the public lands turned over to the municipality. Supposing the contract had not been abandoned by complainant himself or terminated by his long delay, its obligation remained as before and formed the measure of his right to recover from the state for the damages sustained."

The court then holds that the Act neither impaired the obligation of plaintiff's contract nor deprived him of his property without due process of law because there

was adequate provision for compensation in the statutes of the State of Washington which entitled any person having a claim against the state to begin an action thereon in the manner prescribed by the statute, after which the action would proceed in all respects as other actions with the right of appeal to the Supreme Court, and in case of a final judgment against the state a transcript of it would be furnished to the auditor of state, who then would be required to audit the amount of damages and costs therein awarded and pay the same out of the state treasury.

Appellee has no such remedy under the laws of Ohio because there is no statute of Ohio authorizing a citizen to sue the state in any such a case as this, and the law of Ohio is that a citizen may not sue the state without its consent.

Rodebaugh vs. State of Ohio, 96 O. S. 513.

In that case the syllabus reads as follows:

> "1. The state is not subject to suit in its own courts without its express consent.
>
> 2. The provision of the Ohio Constitution, Article I, Section 16, as amended September 3, 1912, that 'suits may be brought against the state in such courts and in such manner as may be provided by law' is not self-executing; and statutory authority is required as a prerequisite to the bringing of suits against the state."

Appellee's only remedy is the remedy it now seeks through this action against the state highway director.

j. *Injunction Is the Remedy*: We deem it unnecessary to comment on any of the many authorities sustaining the right of a complainant to the remedy of

injunction against administrative officers of a state enjoining the enforcement, operation or execution of a statute of the state upon the ground of the unconstitutionality of such statute. The remedy by injunction is given not only when the contract is entered into directly by the legislature of the state but also when it is entered into by the state through a public board authorized to make the contract and also when the state's power is exercised indirectly through the agency of a municipal corporation invested by the legislature with necessary authority for such purpose.

Terrace vs. Thompson, 263 U. S. 197, 214, 215, 216; 68 L. Ed. 255;

Cavanaugh vs. Looney, Attorney General, 248 U. S. 453, 456; 63 L. Ed. 354;

Louisville & Interurban R. R. Co. vs. Greening, Auditor, 244 U. S. 499, 506, 507; 61 L. Ed. 1280;

Cuyahoga River Power Co. vs. Akron, 240 U. S. 462, 463, 464; 60 L. Ed. 743;

Walla Walla vs. Walla Walla Water Co., 172 U. S. 1, 9, 12, 13; 43 L. Ed. 341, 346;

Mobile Gas Co. vs. Patterson, 290 Fed. 476, 483.

k. *Appellee's Contracts Were Ratified and Confirmed by Subsequent Legislative Acts*: A grant by a state, defective when made because of lack of power or authority, may be cured through subsequent ratification and confirmation by the law making body of the state. We have already discussed the Act of 1902 claiming, and we believe demonstrating, that that Act ratified and con-

firmed appellee's contracts for the time they have yet to run according to their terms and this on the ground that Section 4 of that Act authorized and commanded the board of public works to revise and readjust all water contracts on the property here in question, including, of course, the contracts of appellee.

Our claim specifically on this phase of the case is that the Acts of 1830 and 1840 gave full power to the board of public works to make these contracts at the time they were made, navigation on the canal having been abandoned prior to the execution and delivery of the contracts. If, however, there was any lack of power in the board of public works to make such agreements as valid contracts binding on the state, then the Act of 1902 confirmed those agreements and validated them for the time they have yet to run.

But the State of Ohio through its law making body has ratified and confirmed these contracts in appellee in two separate legislative Acts passed since the execution and delivery of the contracts.

The first Act is the one passed January 22, 1920 (Appendix, Paragraph 35, page 225), under which Toledo purchased Lineal Part 1. This is the Act which was construed by the United States Circuit Court of Appeals for the Sixth Circuit in the case of *The Maumee Valley Electric Company vs. Toledo*, 13 Fed. 2d Series 98-105. In that case the court in effect held that the Act was a ratification and confirmation in appellee of the contracts, the Act providing that appellee could not be deprived of its rights under the contracts without compensation being first made therefor in accordance with the terms of the Act.

The second Act was the one passed March 27, 1925 (Appendix, Paragraph 37, page 230), which declared an abandonment of Lineal Part 2 of the canal and provided for the sale of the same to the county commissioners of Lucas County, Ohio. In its terms this Act is the same with respect to Lineal Part 2 as affected by appellee's contracts as was the Act of January 22, 1920, with respect to Lineal Part 1 and said contracts. This Act gave the county commissioners of Lucas County an option to buy Lineal Part 2, but provided that if they should see fit to buy it they should pay an appraisal price to be fixed by the agents of the state plus a fair compensation to the lessees of the state, including appellee, and their rights under their existing contracts for either land or water or both and their rights to a renewal of such contracts. These provisions of recognition, ratification and confirmation are written in Sections 1, 5, 6 and 8, and in Section 5 of that Act appellee's contracts were protected with respect to both Lineal Parts 1 and 2 of the canal.

Our claim for ratification and confirmation of these contracts by its legislative Acts is fully sustained by the case of *Terrett et al. vs. Taylor et al.*, 9 Cranch 43, 47, 50, 52; 3 L. Ed. 650.

In that case certain land grants in Virginia were made by the crown to the parson of a church for the use and benefit of the members thereof. An Act of the legislature of Virginia in 1776, passed after the original grant confirmed to the church its rights to these lands, but other Acts passed in 1798 and 1801 attempted to divest the church of the property acquired previous to the Revolution by donations as aforesaid. This court

held the legislative Act of 1776 to be a confirmation of the original grant and that if there were any defects in the original donations of the lands, such defects were corrected and the title confirmed in the church by that Act. It was also held that the Acts of 1798 and 1801 were unconstitutional and inoperative as violating the contract clause of the Constitution of the United States.

But in addition to all the above the Act attacked in this case cannot be sustained, but must be held to be contrary to the Constitution of the United States as impairing the obligation of appellee's contracts and depriving it of its property without due process of law on the principles of equitable estoppel.

Proceeding under the broad powers granted by the Acts of 1830 and 1840 and the Act of 1902, appellee acquired its contracts from the state through the latter's board of public works. Thereunder there was worked out between the board and appellee a definite plan through which the entire cost and expense of maintenance of the canal, including the Grand Rapids Dam, from the Maumee River to Lock 45 involving all of Lineal Part 2 and the southwesterly end of Lineal Part 1 to that lock, was laid upon and assumed by appellee. In working out that plan appellee, with full knowledge of the state, invested a large amount of money in constructing the hydro-electric plant at Maumee through which it could utilize the water called for by the contracts in generating electricity to be supplied to the public for light, heat and power purposes.

In the supplementary agreement executed and delivered in pursuance of the Acts of 1830 and 1840 and the later Act of 1902, the state recognized that its prop-

erty was not in condition to give satisfactory service to appellee and that the rentals received by it up to that time were not sufficiently large to enable it to give satisfactory service. The whole situation was therefore readjusted and revised and the rentals to be paid by appellee were greatly increased. Appellee reassumed the entire cost and expense of maintenance of all the property in question throughout the running of the contracts. In addition to all the above it assumed and performed the obligation to make, at its own expense, a great improvement on this property by deepening and widening the canal, removing all rock bars and other obstructions therefrom and raising the banks thereof so that the state could let into this canal as it agreed to do all the water that the canal could safely carry from the pool above the dam to the hydro-electric plant. This work of improvement cost appellee $53,000.00.

These facts bring this case, not only within the case of *Railroad vs. Cleveland*, 85 O. S. 251, but bring it fully within the case decided by this court of *Los Angeles vs. Los Angeles City Water Works Co.*, 177 U. S. 558, 582, 583, 584; 44 L. Ed. 886.

1. ***The Contract Between Toledo and the State Was Entered Into by the Latter in Its Private Capacity for the Benefit of Appellee, and the Act Attacked in This Case Impairs Its Obligations and Deprives Appellee of Its Property Thereunder Without Due Process of Law.***

The contract referred to in the above heading was entered into between the State of Ohio and the City of Toledo for the use and benefit of appellee under the provisions of the Act of January 22, 1920. This Act is set

out in full in Paragraph 35 of the Appendix to this brief, page 225. It was construed by the United States Circuit Court of Appeals for the Sixth Circuit in the case of *The Maumee Valley Electric Company vs. City of Toledo*, 13 Fed. 98-105. Under that Act Toledo purchased Lineal Part 1 of the canal in question here. The court of Appeals in the above decided case held that under the terms of that Act and the purchase by Toledo in pursuance thereof the State of Ohio entered into a contract with Toledo in behalf and for the benefit of appellee. The Act declared an abandonment of Lineal Part 1 of the canal both for canal and hydraulic purposes,

> "subject, however, to the rights hereinafter in Sections 6 and 7 provided for."

Section 5 gave the City of Toledo an option of either leasing or purchasing Lineal Part 1.

Section 6 provides that if Toledo should signify its intention to purchase the property, the governor was authorized as soon as the purchase price had been paid into the state treasury

> "to execute a deed conveying said property in fee simple to the City of Toledo, Lucas County, Ohio, but excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both and the rights of said owners to a renewal of said existing leases, which deed before delivery shall first be approved by the attorney general."

Section 7 provides that if Toledo should decide to lease the property, the superintendent of public works

> "is hereby authorized to execute and deliver to the said City of Toledo a lease conveying to said city all the right, title and interest of the State

of Ohio in and to said abandoned canal property either in perpetuity or for a term of years, excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both and the rights of said owners to a renewal of said existing leases."

This section then further provides that:

"In case the state's lessees are at any time under the terms of this Act deprived of their water privileges, the City of Toledo shall pay such lessees a fair compensation for the loss of the water to which they are entitled, and in case the amount of compensation cannot mutually be agreed upon, the City of Toledo shall proceed under the provisions of the General Code to condemn the rights of such lessees for the use of said municipality."

By the terms of the Act the city was to pay an appraisal price to be fixed by a board of appraisers appointed by the governor, plus the fair compensation to the state's lessees as shown by the above quotations. Such a board was appointed and fixed the price at $300,000.00 which the city thereafter paid and received a deed for the property containing the reservations and exceptions required by the Act as shown above. Stipulation Exhibit No. 15 (R. 133.)

Toledo refused to pay appellees for its rights under its contracts and threatened to divert the water from the canal through the side-cut at Maumee. Thereupon the case cited above of *Maumee Valley Electric Company vs. Toledo* was instituted and resulted as above described. Toledo was in that case forever enjoined through final decree on mandate (Stipulation Exhibit No. 18 (R. 138) from interfering in any wise with the

flow of the water in Lineal Part 1 to the hydro-electric plant at Maumee until Toledo should pay compensation to appellee for its water rights under its contracts as construed by the Court of Appeals. Toledo has refused to pay said compensation to appellee in any wise and said final decree is still in full force and effect.

At this point it should be remembered that all the water called for by appellee's contracts must come from the pool in the Maumee River above the Grand Rapids State Dam at the Village of Providence, Stipulation Exhibit No. 25, Map of the Canal, taken through all of Lineal Part 2 of the canal and the southwesterly 1.6 miles of Lineal Part 1 to the hydro-electric plant. Refusing to pay appellee any compensation for its water rights, Toledo procured the introduction and urged the passage by the General Assembly of Ohio of the Act attacked in this case. Section 18, Stipulation and Agreement Between the Parties on the Evidence (R. 66).

This Act declares an abandonment of Lineal Part 2 and attempts to declare appellee's and all other contracts calling for water to be drawn through this canal to be null and void, and it directs the state highway director to take the water out of Lineal Part 2 and to prevent any water from entering the same from the pool of the Maumee River above the State Dam.

The command to the highway director was that he take that action within sixty days after the effective date of the Act, which was August 10, 1927.

If the highway director were permitted to drain the water from Lineal Part 1 and prevent any water entering it from the Maumee River at Providence above the dam, all water called for by appellee's contracts would

be taken away from it just as effectively as if the water were diverted from the canal at the southwesterly end of Lineal Part 1, which is the property purchased by Toledo.

Prior to the passage of the Act attacked in this case, appellee, by the legislative Act under which Lineal Part 1 was sold to Toledo, was given complete remedy for the loss of its rights under its contracts and those rights were thereunder protected by injunctive decree of the United States Circuit Court of Appeals. Toledo in that case petitioned for a writ of *certiorari* to this court to review the same, but the petition was denied. (Case 554, October Term, 1926, United States Supreme Court.)

The Act attacked in this case (Appendix, Paragraph 39, page 236) would not only nullify the contract hereinabove described, entered into between Ohio and Toledo for the benefit of appellee, but it would nullify the decision of the United States Circuit Court of Appeals establishing that contract as well as the final decree entered in coformity with that decision.

Our claim is that this contract is within the protective provisions of the contract and due process clauses of the Constitution of the United States.

In the case of *State of Ohio ex rel. Archibald Houston et al. vs. Commissioners of Perry County*, 5 O. S. 497, 505, the facts briefly stated were that the county seat of Perry County was situated prior to 1851 in the Village of Somerset in that county. On March 22, 1851, the General Assembly of Ohio passed an Act referring to the voters of Perry County the question of the removal of the seat of justice of said county to New Lexington in

that county. The Act provided the method of proceedings for taking the vote by the people and provided that if more votes should be given at the election for removal than should be given against removal, then the seat of justice

> "shall be established at the Town of New Lexington, provided that said removal shall not take place until suitable county buildings shall have been provided in the Town of New Lexington."

It further provided that if the vote should be in favor of removal, it should be the duty of the county commissioners to erect in the Town of New Lexington a suitable court house, jail and other public buildings for the public offices of the county, and the commissioners were to dispose of the county buildings in Somerset as they might think proper and apply the proceeds thereof in the erection of the buildings at New Lexington.

It further provided that when suitable buildings should be provided, the officers and the Courts of Common Pleas and Supreme Court sessions should be held in New Lexington, and thenceforth that town should be the seat of justice in Perry County.

Section 6, however, provided that this Act should not take effect unless the friends of removal on or before July 1, 1851, secure to be paid to the commissioners of Perry County a sufficient amount of money to be paid in three equal installments to erect such suitable buildings in New Lexington, the commissioners to determine the amount necessary. Should the money be secured, as provided in this section, then notice was to be given by the commissioners to the voters by newspaper publication in the county for four weeks previous to the taking

of the vote that the amount necessary had been secured, and the Act provided that in that event the Act should be and remain in full force.

Before July 1, 1851, the friends of the removal of the county seat, consisting of the relators in the case and some fifteen others, secured to be paid to the then commissioners of the county the amount of money deemed necessary for the erection of the buildings at New Lexington. Publication of the election was made and a vote was taken in pursuance of the Act on the question of the removal. The election resulted by some hundreds majority in favor of removal.

The commissioners then in office March 2, 1852, entered into a contract for the erection of the buildings at New Lexington to be completed April 1, 1854. The work proceeded under the contract under direction of the then commissioners of the county, until November, 1853, when the buildings were nearly completed. At this time the then acting commissioners abandoned the buildings and refused to go further in their construction. They refused to permit anything further to be done on the buildings although they were almost completed and paid for out of funds raised by the relators and other friends of the removal in pursuance of the contract with the commissioners for raising the funds. On March 2, 1853, the General Assembly of Ohio passed an Act providing for the removal of the county seat of Perry County from New Lexington back to the Village of Somerset. The statute of March 22, 1851, and the vote taken thereunder, it will be remembered, had legally located the county seat at New Lexington, but actual removal had not yet been made when this Act of 1853 was passed. The re-

lators in the case were taxpayers of Perry County, residents of New Lexington and owners of property in and near that town. The Act of March 2, 1853, provided that after the taking effect of the Act, as in the Act provided, the seat of justice in the County of Perry should be removed from New Lexington and permanently fixed at the Town of Somerset. The Act further provided that it should take effect when and as soon as it should be adopted by a majority of the electors of Perry County voting at the next general election, as in the Act provided, and the Act provided how the vote should be taken.

Section 5 of this Act provided that if a majority of said electors of the county voting at the election should vote against removal back to Somerset, then all the obligations given by the relators and other taxpayers to the commissioners of the county, in accordance with the sixth section of the Act, passed March 2, 1851, should be delivered up to be cancelled, and the commissioners should proceed at once to levy a tax sufficient to erect a court house and other buildings in the Town of New Lexington which should cost not less than sixteen thousand dollars ($16,000.00).

On the vote taken under this Act a majority of the electors in Perry County voting on the question voted in favor of the Act for removal back to Somerset.

In deciding this case our Supreme Court in its opinion on page 505 of the report, used the following language:

> "In this posture of affairs, would it have been within the constitutional power of the legislature, without the consent if the parties, to annul this contract, and by enactment declare that the obli-

gations thus held by the commissioners should be delivered up and cancelled? We do not see how such a law could be reconciled with the provisions of our Constitutions, state and national, which were intended to secure the inviolability of contracts. But in the case before us, by the section under consideration, there is taken away from the people of Perry County all possibility of deriving any benefit from the contract which, through their commissioners, they had entered into with the relators; for, if they vote 'for removal' public buildings at New Lexington become unnecessary, and the relators are released from their obligation to furnish means for their construction.

If a vote 'against removal,' then, by the express terms of this section, 'all obligations heretofore given,' etc., 'shall be by said commissioners delivered up to be cancelled,' and the fund thus taken from the county, in violation of a subsisting, valid contract, is to be raised by immediate taxation; so that, in any event, the obligations of the contract are wholly cancelled."

The opinion holds that the contract between the friends of removal and the county commissioners was made for the benefit of all the taxpayers in Perry County and the fifth paragraph of the syllabus of the case is that:

"The fifth section of said Act imposes upon the County of Perry a forfeiture of subsisting rights acquired under a legal contract, in the event of a majority vote against removal of the seat of justice and is therefore unconstitutional."

In the case of *Terrett et al. vs. Taylor et al.*, 9th of Cranch, 43, 47, 48, 49, 50; 3 L. Ed. 650, certain land grants in Virginia were made by the crown to the parson of the church for the use and benefit of the members of

the church. An Act of Virginia of 1776 confirms to the church its rights to these lands, but other Acts passed in 1798 and 1801 attempted to divest the church of the property acquired previous to the Revolution by donations as aforesaid.

This court held that these Acts of 1798 and 1801 were unconstitutional and inoperative as violating the contract clause of the Constitution of the United States and as attempting to deprive the church of the property donated for the use and benefit of the members of the church. The court also held that if there were any defects in the original donations of the lands, the Act of the State of Virginia, passed in 1776, confirmed the title of the church in said lands and that it was not inconsistent with the constitution or bill of rights of Virginia.

Dartmouth College Case, 4 Wheat. 644, 645.

In the case of *The Maumee Valley Electric Company vs. City of Toledo*, 13 Fed. 2d Series 98-105, it was held that it has long been established that a person for whose use and benefit a contract has been made between other parties may enforce that contract in equity. This has been the rule in Ohio for many years.

Crumbach vs. Kugler, 3 O. S. 549;
Emmet vs. Brophy, 42 O. S. 82;
Embleton vs. McMechan, 110 O. S. 18, 30;
In re Roth, 272 Fed. 516;
Coster vs. Mayer, 43 N. Y. 411;
Keller vs. Ashford, 133 U. S. 610, 626; 33 L. Ed. 667;
Jones vs. Wilson, 180 U. S. 440, 447, 449; 45 L. Ed. 613.

We take it the real test as to whether a contract is protected by the contract clause of the Constitution prohibiting the impairment of the obligations of a contract is whether the contract may be enforced by the party for whose benefit it is made. If it is an illegal contract, then of course it is not a contract in a legal sense and may not be enforced. A lottery contract has been held by this court to be illegal and unenforceable.

Douglas vs. Kentucky, 168 U. S. 488, 502;
42 L. Ed. 553, 557.

Under the law as established by the Supreme Court of Ohio, appellee is in privity with the parties to this contract and to the contract itself. It was provided for by the Act of January 22, 1920, and it was executed and delivered through the deed from the state to Toledo. Stipulation Exhibit No. 15 (R. 133). The Act itself created privity between the parties to the contract and appellee, cast privity upon appellee.

Page on Contracts, 2d Ed., Vol. 4, Sec. 2388;
Washburn vs. Interstate Investment Co.,
26 Ore. 436, 441, 442, 443.
Brewer vs. Dyer, 7 Cush. (Mass.) 337, 340.

Privity is held to exist

"whenever the intention of the contract is to confer a benefit upon the third person."

Page on Contracts, *supra;*
Ruohs vs. Traders Fire Insurance Co., 111
Tenn. 405.
26 Ore. *Supra* 442.

There can be no question but that the General Assembly intended to protect and benefit appellee when the Act of 1920 was passed carrying the protective provisions thereof requiring Toledo, the other party to the contract, to compensate appellee for the loss of its water rights if the water should be taken out of the canal.

In the case of *The Maumee Valley Electric Co vs. Toledo*, 13 Fed. 2d Series 104, the court in discussing those protective provisions and the question as to whether the state was required under the law to protect appellee, said:

> "It is enough that as we think it chose rather to recognize its moral obligation to respect the rights of its lessees, property holders and citizens. That it had the legal and moral right to do so is undeniable. A contrary course would have been unnatural and inequitable. The city, by the acceptance of the deed from the state, upon the terms and conditions contained in the legislative Act, has effectively contracted to respect plaintiff's interests. This was part of the consideration for the purchase and sale. The city is, in our opinion, equitably estopped from repudiating the obligations towards plaintiff thus deliberately assumed."

The question of the right of a beneficiary under such a contract as this one to enforce the same usually arises between such beneficiary and the promisor, specifically in this case the City of Toledo. The state is the promisee. The great weight of authority is that the beneficiary may enforce such a contract against the promisor and that was the express holding in the case last quoted.

In the case of *Follansbee vs. Johnson*, 28 Minn. 311,

312, the Supreme Court of Minnesota in the opinon states that

> "The decided weight of authority in this country is to the effect that, with regard to contracts not by specialty, the person for whose benefit the promise is made may enforce it, though he be a stranger to the contract and to the consideration."

The above case is approved by the Supreme Court of Minnesota in the case of *Stariha et al. vs Greenwood*, 28 Minn. 521, 522.

The cases in which the rule will not be applied are cases in which the contract in question is not made for the benefit of the third party, generally cases in which neither of the contracting parties were bound in any way by any consideration to the third party.

Walsh vs. Railroad Co., 58 O. S. 123, 158, 159; 176 U. S. 469, 479.

In the *Walsh* case the United States Government in 1828 donated a large tract of land to the State of Ohio to aid that state in the construction of its canals. The Act of Congress making the donation provided among other things that

> "The said canals when completed *or used* shall be and forever remain public highways for the use of the Government of the United States free from any toll or charge whatever for any property of the United States or persons in their service passing along the same."

The state had sold a portion of the Hocking Canal to the Railroad Company, Walsh being a user of water from that portion of the canal. He brought an action against the Railroad Company and in support of his

claim urged that the legislative Act selling the canal to the Railroad Company impaired the obligation of the alleged contract between the United States and the State of Ohio under which the former donated the land to the latter. In answering this contention the Supreme Court of Ohio on page 159 of the report said:

> "But a more decisive answer to this contention is, we think, that none of these parties show that they were in any way parties to the agreement between the state and the United States, *or that it was made for their benefit.*"

The second paragraph of the syllabus, page 123, reads as follows:

> "2. A party cannot for his own benefit insist upon the performance of a contract between others and to which he is not a party or privy; nor claim relief against either of the parties to such a contract for investments or improvements he may have made on the assumption that the contract would be observed."

The same doctrine is settled and held to be the rule by this court.

> Keller vs. Ashford, 133 U. S. 610, 623, 624-626; 33 L. Ed. 667.

In the opinion of the *Keller* case, page 623, this court, discussing the question of the right of the third person, beneficiary, to enforce a contract made between two other parties for such third person's benefit, says:

> "In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is en-

> titled, in equity, to be substituted in his place for the purpose of compelling such principal to pay the debt."

In the case of *Fry vs. Ausman*, 29 S. D. 30, 39, the Supreme Court of South Dakota in discussing this question quotes with approval the holding of this court in the *Keller* case, *supra*, and says in effect that for the third person to recover and enforce the contract, two elements must appear:

> "(1) There must be an intent to benefit the third party; and (2) the promisee must owe some obligation to the third party."

But in the instant case the moral or equitable obligation of the State of Ohio to protect appellee's contracts and provide for compensation to be paid to it, it sufficient consideration to and obligation on the state for such protection and provision. The state, through the legislative Act of 1920, made appellee a privy between the parties and to the contract entered into between the state and the City of Toledo under which Toledo purchased Lineal Part 1 of the canal. This Act by its own terms cast privity upon appellee. It made the City of Toledo the principal debtor as a part of the consideration to move from it in the purchase of the property in question. The state received $300,000.00 in cash for the property and through the Act required Toledo to compensate the state's lessees, including appellee. The least that can be said of the state's obligation in this respect is that it is a surety in behalf of appellee that it will never be deprived of its rights under its contracts until it shall be paid for such rights.

Kelley vs. Ashford, *supra*, 623.

The state, however, may not pass a law impairing the obligation of a previous statute based upon a moral and equitable consideration and obligation.

United States vs. Realty Co., 163 U. S. 427, 436, 437 to 442, 444; 41 L. Ed. 215.

In this case the Congress of the United States on October 1, 1890, approved an Act known as the Tariff Act of 1890. Section 231 of this Act provided a bounty of two cents per pound should be paid to certain producers of sugar and that a bounty on one and three-fourths cents per pound should be paid to certain other producers of sugar. Provision was made in the Act for the procedure to be followed by the producer to entitle him to receive the bounty. In August of 1894, Congress passed another Act through a section of which the provisions of the former Act providing for the payment of such bounties were repealed, and it was provided that thereafter it should be unlawful to issue any license to produce sugar or to pay any bounty for the production of sugar of any kind under the Act of 1890. (Pp. 428, 429.)

By an Act passed by the Congress on March 2, 1895, it was provided that the secretary of the treasury should pay bounties to certain producers of sugar who complied with the provisions of the bounty laws as contained in the Act of 1890 and for this purpose the Congress appropriated $238,289.08. This Act also provided for the payment of bounties to certain other producers of sugar who complied with the provisions of the bounty law as contained in the Act of 1890 prior to July 1, 1894, and who would have been entitled to receive a license as provided in said Act. For the payment of these bounties

the Congress appropriated $5,000,000.00 or so much thereof as might be necessary. (P. 430.)

Under the provisions of the Appropriation Act last above mentioned two parties, the Realty Company and Andrew H. Gay, each presented a claim for an amount of bounty claimed to be due under the Act, which claims were refused by the disbursing officer of the government, and each of these parties then brought an action under the Tucker Act in the Circuit Court of the United States for the Eastern District of Louisiana to recover the amount claimed due them respectively. The government claimed that the Act of 1890 insofar as it provided for the payment of bounties was unconstitutional, null and void, and that therefore the Appropriation Act providing for payment of bounties was unconstitutional and void. (Pp. 431, 432.) This court held that it was not necessary to pass upon the constitutionality of the Act of 1890. The government claimed (p. 437) that:

> "No claim, legal, moral, equitable or honorable, can be created in favor of the sugar manufacturer and against the government, and that where there is neither legal, moral nor honorable obligation to pay, Congress has no power to appropriate money."

This court held that:

> "In our opinion it is not correct to say that no moral, equitable or honorable obligation can attach in favor of persons situated as were the defendants in error here, when the Act of 1895 was passed. We think obligations of that nature may arise out of such circumstances. We regard the question of the unconstitutionality of the bounty provisions of the Act of 1890 as entirely immaterial to the discussion here."

Then again on page 439 the opinion says:

> "We are of the opinion that the parties situated as were the plaintiffs in these actions acquired claims upon the government of an equitable, moral or honorary nature. Could Congress legally recognize and pay them although the Act of 1890 as to its bounty provisions might be unconstitutional? It is true that in general an unconstitutional Act of Congress is the same as if there were no Act. That is regarding it in its purely legal aspect. Being in violation of the Constitution, that instrument must govern and no one can base any legal claim as arising out of such an Act. That is a very different principle, however, from that which we think governs in this case."

Referring to the power of Congress under the Constitution "to pay the debts" of the United States, the holding is that:

> "The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a debt to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature such as are binding on the conscience or the honor of an individual although the debt could obtain no recognition in a court of law."

This court held the Appropriation Act to be a valid Act upon the considerations above set out and it finally says, page 443:

> "The power to provide for claims upon the state founded in equity and justice has also been recognized as existing in the state governments.

For example, in *Guilford vs. Chenango County Supers.*, 13 N. Y. 143, it was held by the New York Court of Appeals that the legislature was not confined in its appropriation of public moneys to sums to be raised by taxation in favor of individuals to cases in which legal demands existed against the state, but that it could recognize claims founded in equity and justice in the largest sense of these terms or in gratitude or in charity.

Of course the difference between the powers of the state legislatures and that of the Congress of the United States is not lost sight of, but it is believed that in relation to the power to recognize and to pay obligations resting only upon moral considerations or upon the general principles of right and justice, the Federal Congress stands upon a level with the state legislature."

Williamsburgh Savings Bank, Appellant,
vs. State of New York, Respondent,
243 N. Y. Rep. 231-234, 244, 245.

In the *Williamsburg Savings Bank* case the State of New York, through its legislature, entertained a project to improve a creek providing for a better flowage of its waters and protection to adjacent lands from floods and other damaging conditions. The state did not itself undertake this project, but confided the duties, first, of approval of the project and then the consummation of it, to the state's water supply commission and two other commissions. Provision was made in the Act that the cost and expense should be paid through special assessments levied upon the property and various municipalities to be benefited by the improvement. The commissions approved the plan, started the improvement and issued bonds to pay the cost and expense of

the improvement. It levied the assessments, however, only on certain lands. It finally turned out that the lands were not of sufficient value to bear the improvement assessments placed upon them and therefore funds were not forthcoming from the owners of this property to pay the bonds. The legislature had made these bonds legal investments for savings banks, and the improvement commissions had represented to the public that the lands assessed were of ample value to bear the assessment. The legislature thereafter passed an Act, page 239 of the report, conferring jurisdiction upon the Court of Claims to hear and determine the claims of the holders and purchasers of the certificates of indebtedness, bonds and tax sale certificates issued in connection with the creek improvement district. The plaintiff in error brought suit to establish its claim on some of the bonds against the state and alleged that the claim was supported by a moral consideration. The state objected on the grounds, first, that there was no such consideration, and second, the state had never exercised its right to recognize the claim and authorize its allowance. The appellate court of New York in the opinion deciding the case and holding that under the circumstances of that case the state was morally bound to pay the bonds and that the legislature had authorized payment of the claim on a moral consideration, cited with approval the case of *United States vs. Realty Company, supra.* (Pages 244, 245.)

The opinion at page 245 takes up the question whether the facts in that case did establish a claim possessing the elements of a moral obligation, and after re-

citing the facts on pages 245 and 246 more in detail than we have given them above, said:

> "Those facts, in our opinion, within the principles of cases already cited, do not permit it to be said as a matter of law that the state is without any moral responsibility for what has happened and that it must stand unresponsive when asked to relieve those whom indirectly at least it has brought into an unhappy predicament by retiring obligations which in essence and equity are its own. We find it quite difficult to believe that an honorable business man would not suffer considerable moral discomfort if he should refuse to recognize claims to reparation for losses for which he was so substantially responsible as is the state for the present claims and, in such matters, standards of good conduct ought not to be less conscientious in the case of the commonwealth than in that of one of its citizens."
>
> Keith vs. Clark, Collector, etc., 97 U. S. 454, 463; 24 L. Ed. 1071, 1074.

In this case the State of Tennessee in 1838 organized the Bank of Tennessee and in the 12th section of the Act of the legislature it was

> "enacted that the bills or notes of the said corporation originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of this state and by all tax collectors and other public officers in all payments for taxes or other moneys due to the state."

Plaintiff Keith tendered to Clark the tax collector, $40.00 of the bills of the Bank of Tennessee. Clark refused to accept the bills and Keith paid $40.00 in lawful money under protest for taxes due the State of Tennes-

see after he had tendered that sum in the circulating notes of the Bank of Tennessee. These bills were issued subsequently to May 6, 1861, and the collector refused to take them, as above stated, because the Constitution of the State of Tennessee was amended in 1865 (prior to Keith's attempt to use the bills in payment of taxes), such amendment declaring that all the notes of the bank issued after May 6, 1861, were null and void, and forbade any legislature to pass laws for their redemption. Keith instituted action to recover the $40.00, but was defeated in the lower courts and the Supreme Court of Tennessee sustained their holdings. Error was prosecuted by Keith to this court. This court held that the contract between the State of Tennessee and its own bank providing that all that bank's bills should be received in payment of taxes, was a contract protected by the contract clause of the Constitution. (Page 462.) That contract of course was made for the benefit, among others, of all taxpayers who should happen to come into possession of the circulating notes of the bank. In other words, the contract there in question was a contract between the State of Tennessee and the Bank of Tennessee for the benefit and in behalf of all taxpayers of the state.

This court held that the State of Tennessee must carry out the contract.

Now, what we are contending for is that through the Act of January 22, 1920, in pursuance of which Toledo entered into a contract with the State of Ohio for the benefit of appellee, which contract was consummated by the deed from Ohio to Toledo (R. 133) appellee had and except for the Act attacked in this case still has a complete remedy for compensation to it for the loss of its

rights under its contracts if the water shall be taken out of the canal. (R., Final Decree on Mandate, p. 138.) If the Act attacked in this case shall be executed and the water be drained from Lineal Part 2 of the canal and be prevented from entering that part from the Maumee River, then appellee's remedy is gone and its property, both under its contracts and in its plant, is confiscated.

In the case of *United States ex rel. Von Hoffman vs. City of Quincy*, 4 Wall. 535, 550, 552, 553; 18 L. Ed. 409, this court said:

> "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed in the sense of the law, be said not to exist and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable and both are parts of the obligation which is guaranteed by the Constitution against invasion. The obligation of the contract is the law which binds the parties to perform their agreement. The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden."

> "One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the Constitution to be impaired a tall. This is not a question of degree or cause but of encroaching in any respect on its obligation—dispensing with any part of its force."

> White vs. Hart, 13 Wall. 646, 654; 20 L. Ed. 685.

> Hendrickson vs. Apperson, 245 U. S. 105, 112.

The contract clause of the Constitution does not by its terms exclude a contract made between two parties for the benefit of a third. The clause is all-inclusive.

Fletcher vs. Peck, 6 Cranch 87, 136, 137.

In the instant case the law is established that the contract here was made for the benefit of appellee, and our United States Circuit Court of Appeals has said that the promisee, the state, was under moral and equitable obligation to extend that protection. This statement of that court is sound, not only because of appellee's contracts with the state even if such contracts had been entered into by the state in its governmental capacity, but they were entered into by the state in its proprietary or private capacity, and because of that fact the State of Ohio was legally bound to protect appellee in its contracts.

It certainly cannot be the law that a sovereign state may enter into such agreements as appellee's contracts are, under the attendant circumstances, bind its grantee to the performance of specified obligations to the state's lessee as a part of the consideration of the grant from the state to its grantee, and then through a subsequent legislative Act annul the contract with that grantee so far as the beneficiary is concerned by taking away from such beneficiary all remedy under its contracts direct with the state and under the contract between the state and its grantee, made for benefit of appellee.

4. The Act in Question Here Passed May 11, 1927, (Appendix, Paragraph 39, page 236) Shows on Its Face That There Is No Intention on the Part of the State Itself Ever to Devote These Canal Lands, Lineal Part 2, to Highway Purposes, But That on the Contrary It Is an Act Designed Particularly to Turn This Property, Which Belongs to All the Citizens of Ohio, Over to the Political Subdivisions of Lucas County and the Townships and Municipalities Along the Line of Such Lands Without Any Consideration Moving From Such Subdivisions.

On this subject it will first be noted that after providing in Section 1 for the abandonment of the canal, Section 3 provides that the lands used and occupied by that part of the canal shall be forever held by the state in fee simple for the purpose of constructing thereon a highway at such times as the state *may hereafter* find convenient. The Act, so far from evidencing any present intention or need of the state to devote the canal bed to that purpose, distinctly belies any such need. This is followed by Section 4, containing, if appellants' contention is sound, the wholly unnecessary provision that all leases for canal or hydraulic purposes shall become null and void *on and after sixty days* from the taking effect of the Act. Up to this point, therefore, the Act attempts a wholly uncalled for, unnecessary thing, to-wit, the destruction of the water power and the cancellation of water leases prior to any need on the part of the state of the land for alleged highway purposes. Then follows the real motive behind the abandonment. By Section 7 the director of highways is to plat so much of

the canal as is to be used for highway purposes and so much of it as may be leased for other purposes. *But until the state shall construct the highway,* all municipal corporations through which the proposed highway may (perhaps) pass *are permitted to use* the canal lands *without compensation.* (Section 8.) Here is a water power granted to the appellee under which it has expended large amounts of money improving the state's property and constructing appellee's own plant, relying on the supposed good faith of the state. For the pretended reason that it is necessary for state highway purposes the legislature proposes to abandon the canal, and then, as an admission that it is not at all necessary for those purposes, the abandonment Act provides that until the state constructs the highway the municipalities *may use the land gratis.* The Act shows that the proposal of the state to use the canal bed for highway purposes is really not contemplated and entirely apart from the question whether the state may abrogate its water power grants in order to permit a canal bed to be used by municipalities *free of charge,* it is respectfully submitted that here in this court of equity the abandonment Act should be scrutinized from the standpoint of its lack of good faith, particularly in view of the fact that in 1925 (111 Ohio Laws, 367) the legislature's then attempted abandonment of the canal provided compensation to the appellee and a reasonable price to be paid by the county to the state for the canal land. To have to pay for the land and for plaintiff's water power, however, was not to the liking of the county, as it is not to the city, and so we are now confronted with the spectacle of an abandonment Act providing no compensation for

the appellee and permitting the county and adjacent municipalities to use the canal gratis.

To permit the Act attacked here to be executed would amount simply to a turning of this property to the use, occupation and benefit of the City of Toledo and the other municipalities and townships along the line. Such a course is forbidden by the contract clause and Section 1 of the Fourteenth Amendment to the Constitution.

Missouri Pacific Railway Co. vs. Neb., 164 U. S. 403; 41 L. Ed. 489.

Respectfully submitted,

U. G. Denman,
Karl E. Burr,
Counsel for Appellee.

APPENDIX

Desiring in connection with this case to set out a complete legislative history of the Miami and Erie Canal, beginning with the Constitution of Ohio of 1802 and giving reference to, recitals of, and quotations from, the various legislative Acts, and the Constitution of 1851 and amendments thereto, we concluded that in addition to such history as is narrated in the body of the brief, we should attach to this brief an appendix with headings properly numbered and in paragraphs also numbered so that the same may be referred to in the argument on the points of law and fact discussed. The constitutional and legislative provisions are in evidence under stipulation between the parties. (R. 59.)

CONSTITUTION AND STATUTES OF OHIO TO BE CONSIDERED

I

Provisions of Ohio Constitution With Respect to the Public Works of Ohio of Which the Miami and Erie Canal Has Always Been a Part.

Paragraph 1. The first constitution of Ohio, 1802 contained no specific provision with respect to canals or other public works. By Section 1 of Article I of that constitution, the legislative power of the state was vested in a General Assembly consisting of a Senate and House of Representatives, and the power for constructing the public works of the state, including its canals, was of course lodged in the General Assembly by that provision of that constitution.

Under that constitution the entire public works of the state were provided for and constructed, and under it they were operated through laws passed by the General Assembly until the constitution of 1851 was adopted.

The only provisions in the constitution of 1851 with respect to public works were Sections 12 and 13 of Article VIII.

Section 12 provided that:

> "So long as this state shall have public works which require superintendence there shall be a board of public works to consist of three members who shall be elected by the people at the first general election after the adoption of this constitution, one for a term of one year, one for a term of two years and one for a term of three years; and one member of said board shall be elected annually thereafter who shall hold his office for three years."

Section 13 provided that:

> "The powers and duties of said board of public works and its several members and their compensation shall be such as now are or may be prescribed by law."

These provisions remained in the constitution of 1851 until September 3, 1912, when Section 12 was amended, providing that:

> "So long as this state shall have public works which require superintendence, a superintendent of public works shall be appointed by the governor for the term of one year, with the powers and duties now exercised by the board of public works, until otherwise provided by law and with such other powers as may be provided by law."

Section 13 above mentioned was repealed September 3, 1912.

II

Legislative Provisions, Primary Acts for Construction and Operation of Canals of Ohio.

Paragraph 2. The *first Act* passed by the General Assembly of Ohio looking to establishment of the state's canal system is the Act passed February 23, 1820, 18 O. L. 147, Vol. 2 Chase's Statutes, page 1131, entitled "An Act Respecting a Navigable Communication Between Lake Erie and the Ohio River." This Act in a preamble recites:

> "Whereas, the effecting a navigable communication, by means of a canal or canals, between Lake Erie and the Ohio River would greatly promote the agricultural, manufacturing and commercial interests of a number of our sister states, of the Union generally and of this state particularly. And whereas there is reason to believe that the congress of the United States, as well from the above motives as from the advantage to be derived from the great appreciation of public lands, through which such navigable communication might pass, would give liberal aid for effecting so desirable an object, therefore,"

Section 1 provided the General Assembly should appoint three commissioners for locating a route for a canal from Lake Erie to Ohio River on the understanding that it should be located through the congress land in the late purchase from Indians in the state.

Section 2 provided that the commissioners should employ a competent engineer and necessary assistants to make surveys for the route of such canal.

Section 3 provided that propositions should be immediately made to congress for a donation and grant of

land to be not less than two miles in width on such route as examination might find most eligible for a canal through part of lands of the United States lately purchased of Indians in Ohio and to be not less than one million (1,000,000) nor exceeding two million (2,000,000) acres in the same tract of country and contiguous to the route of such canal; that the route should be located within one year from date of the Act of congress authorizing the donation or grant and that the canal be completed so far as it should pass through such donation within ten (10) years from time location should be made.

Section 5 provided that the State of Ohio would accept such conditions in relation to recession of the land granted by the United States as the latter might think proper if the canal should not be commenced and carried on according to terms of the cession.

Section 6 provided for the payment of accounts for services of engineers and assistants.

Paragraph 3. The *second Act* of the General Assembly of Ohio was passed January 31, 1822, 20 O. L. 31, Volume 2 Chase's Statutes, page 1220, entitled, "An Act Authorizing an Examination Into the Practicability of Connecting Lake Erie with the Ohio River by a Canal." This Act in a preamble recites that:

> "Whereas, a navigable communication between Lake Erie and the Ohio River would greatly promote the agricultural, manufacturing and commercial interests of the good people of the State of Ohio, and would unite, by the cementing influence of interest and commercial intercourse, the most remote parts of the United States, thereby strengthening the bonds of their political union; and whereas, the practicability of making such navigable communication has not been satisfac-

torily ascertained by an experienced and skillful engineer; therefore, with a view to obtain accurate information touching this highly interesting subject."

This Act authorizes the governor to employ an engineer to make surveys between Lake Erie and the Ohio River; appoints Benjamin Tappan, Alfred Kelly, Thomas Worthington, Ethan A. Brown, Jeremiah Morrow, Isaac Minor and Ebenezer Buckingham Jr., commissioners, to cause examinations, surveys and estimates to be made by an engineer as may be necessary to ascertain the practicability of such canal through the following routes: (a) Sandusky Bay to the Ohio River; (b) Maumee River to the Ohio River; (c) from Lake Erie to the Ohio River by the sources of Cuyahoga, Black and Muskingum Rivers; (d) from the lake by sources of Grand and Mahoning Rivers to Ohio River; and directs these commissioners to make estimates of cost on each route, and compare the advantages of the different routes and report their findings to the next General Assembly with such other information as they might deem important.

Paragraph 4. The *third Act* of the General Assembly was passed January 27, 1823, 21 O. L. 24, Volume 2 Chase Statutes, page 1255, entitled:

> "An Act supplementary to the Act authorizing an examination into the practicability of connecting Lake Erie with the Ohio River by a canal."

This Act authorized the canal commissioners constituted by this and the above recited Act to employ necessary engineers and assistants to carry on the surveys; authorized the commissioners to receive cessions, grants or donations of land or donations of any kind for aid in

construction of the canal; directed the commissioners to appoint two of their board as acting commissioners and fix their compensation; directed the commissioners to ascertain whether loans could be obtained on behalf of the state to aid in construction of a canal from Lake Erie to the Ohio River; and appropriated money to pay the engineers and assistants.

Paragraph 5. The *fourth Act* was passed by the General Assembly February 23, 1824, Volume 3, Chase's Statutes, page 1963, entitled:

> "An Act in addition to the Act authorizing an examination into the practicability of connecting Lake Erie with the Ohio River by a canal."

This Act directs the canal commissioners to continue their labors carried on under the former Acts and also survey the Muskingum and Scioto route not yet completed; to examine the harbors on Lake Erie for terminals; directs the commissioners to employ an engineer of experience in canaling to superintend surveys and estimates heretofore directed and make report to the General Assembly. The Act appropriates money for these purposes.

Paragraph 6. The *fifth Act* was passed by the General Assembly February 4, 1825, 23 O. L. 50, Volume 2, Chase's Statutes, page 1472, entitled:

> "An Act to provide for the internal improvement of the State of Ohio by navigable canals."

This Act provides the canal commission created by the Acts above referred to should consist of seven members appointed by joint resolution of senate and house of representatives; provides their compensation and author-

izes employment of agents, engineers and surveyors; authorizes the commissioners to commence and prosecute making of a navigable canal on Muskingum and Scioto route to Lake Erie and also a navigable canal on so much of the Maumee and Miami line as lies between Cincinnati and Mad River at Dayton, Ohio; creates for such construction a canal fund and a board of commissioners denominated "Commissioners of the Canal Fund" of three members to continue in office for six years, and prescribes their powers and duties in borrowing and disbursing funds. This is the Act which actually authorized the construction of the Miami Canal heretofore mentioned as running from the Ohio River north to Dayton and the Mad River.

Section 5 of this Act provides for payment of interest and final redemption of moneys borrowed under the Act, and in this Section 5 the Act appropriates and pledges:

> "All the net proceeds of tolls collected on the canals herein described *and of the rents and profits of all works and privileges* connected with or appertaining to said canals and belonging to the state."

The above quotation from this primary Act definitely indicates the intention of the General Assembly to utilize the canals for other purposes than navigation. Such langauge undoubtedly would permit the leasing of lands or water or both for hydraulic purposes. This Section 5 makes provision for raising funds for each of several years after passage of the Act and appropriates the same for canal construction.

Section 6 of this Act provides that the money pledged and appropriated by the Act:

> "Together with the net proceeds of all tolls *and of the rents and profits of all works and privileges* connected with said canals shall be paid into the state treasury and shall be kept distinct and apart from other moneys belonging to the state."

This section further provides for keeping of accounts.

Section 7 of this Act authorizes the canal commissioners to receive funds from commissioners of the canal fund.

Section 8 of this Act reads as follows:

> "Sec. 8. That it shall and may be lawful for the said canal commissioners, and each of them by themselves, and by any and every superintendent, agent, and engineer, employed by them to enter upon, and take possession of, and use all and singular any lands, waters, streams, and materials, necessary for the prosecution of the improvements intended by this Act; and to make all such canals, feeders, dykes, locks, dams, and other works and devices as they may think proper for making said improvements, doing, nevertheless, no unnecessary damage, and that in case any lands, waters, streams, or materials, taken and appropriated for any of the purposes aforesaid, shall not be given or granted to this state, it shall be the duty of the canal commissioners, on application being made to them by the owner or owners of any such lands, waters, streams or materials, to appoint by writing not less than three nor more than five discreet disinterested persons as appraisers, who shall before they enter upon the duties their appointment, severally take an oath or affirmation, before some person authorized to administer oaths, faithfully and impartially to perform the trust and duties required of them by this Act, a certificate of which

oath or affirmation, shall be filed with the secretary of the canal commissioners, and it shall be the duty of said appraisers, or a majority of them, to make a just and equitable estimate and appraisal of the loss or damage, if any, over and above the benefit and advantage to the respective owners and proprietors, or parties interested in the premises, so required for the purposes aforesaid, and the said appraisers, or a majority of them, shall make regular entries of their determination and appraisal, with an apt and sufficient description of the several premises, appropriated for the purposes aforesaid, in a book, or books, to be provided and kept by the canal commissioners, and certify and sign their names to such entries and appraisal, and in like manner certify their determination as to those several premises which will suffer no damages, or will be benefited more than injured by or in consequence of the works aforesaid, and the canal commissioners shall pay the damages so to be assessed and appraised, and the fee-simple of the premises so appropriated shall be vested in this state; *provided, however*, that all such applications to the board of canal commissioners, for compensation for any lands, waters, streams, or materials so appropriated, shall be made within one year after such lands, waters, streams, or materials, shall have been taken possession of, by the said commissioners, for the purposes aforesaid."

Section 9 exempts employes on the canal from military duty.

Section 10 authorizes the canal commissioners to make application for the state to congress and owners of lands for grants and donations of land or money to aid in construction of both or either of said canals.

Paragraph 7. The *sixth Act* was passed by the General Assembly January 18, 1826, Volume 3, Chase's Statutes, page 1516, and authorizes the commissioners of

the canal fund to borrow on the credit of the state up to Four Hundred Thousand Dollars ($400,000.00) in the year 1826; a sum not exceeding Six Hundred Thousand Dollars ($600,000.00) in 1827; a sum not exceeding Six Hundred Thousand Dollars ($600,000.00) in the year 1828, and all this in addition to the Six Hundred Thousaid Dollars ($600,000.00) authorized by the fifth Act described above.

Section 2 of this Act authorized a temporary loan of Five Hundred Thousand Dollars ($500,000.00) to be repaid from moneys obtained through the loans last above mentioned, and all these moneys were to be paid out according to the terms of the fifth Act above described.

Paragraph 8. The *seventh Act* was passed by the General Assembly January 31, 1826, Volume 3, Chase's Statutes, page 1525. This Act in twelve sections sets up the legal machinery for the protection of the Ohio canals with respect to the towing path and other banks, obstructing the canal, taking the water therefrom, etc., and prescribes criminal and other penalties for violations of the Act.

In its Section 7 it is specifically provided:

> "That no person shall construct any wharf, basin or watering place on or make or apply any device whatever for the purpose of taking water from either of said canals without first obtaining permission therefor of one of the acting commissioners or of the principal engineer of the canal where such wharf, basin, watering place or device, as aforesaid, is desired, in writing,"

and the section then provides that if any person shall make any such construction or apply such device without such permission or shall not conform to the directions of

the acting commissioner who may give such permission in respect to the location, size and place of such device, such person so offending shall be fined, etc.

Paragraph 9. The *eighth Act* was passed by the General Assembly February 7, 1826, Volume 3, Chase's Statutes, page 1527.

Section 1 of this Act provides:

> "That the canal commissioners be and they are hereby authorized to procure by purchase or otherwise a suitable number of acres of land at each and every point on or adjoining the Ohio canals heretofore authorized to be constructed where the surplus water passing through such canals may be profitably used for *hydraulic* purposes."

An expenditure of the sum of Twenty Thousand Dollars ($20,000.00) was authorized by this section for the purposes just stated.

Section 2 of this Act provides:

> "That the canal commissioners are hereby authorized and empowered to sell such lands and town lots as have heretofore been or may hereafter be given, granted or ceded to the state for the benefit of the canal fund, *other than those which are situated at points or places on or adjoining the line of the Ohio canals where the surplus water produced by said canals can be advantageously used for hydraulic purposes.*"

The canals actually authorized up to the date of this Act were the Miami Canal from the Ohio River to Dayton and the canal on the Muskingum and Scioto route in the eastern part of the state. (See fifth Act above described.)

Paragraph 10. The *ninth Act* was passed February 8, 1826, Volume 3, Chase's Statutes, page 1528. This Act authorizes the canal commissioners to borrow Six Hundred Thousand Dollars ($600,000.00) of any individual or body corporate instead of the loan of Five Hundred Thousand Dollars ($500,000.00) above mentioned.

Paragraph 11. The *tenth Act* passed by the General Assembly of Ohio was passed February 11, 1828, Volume 3, Chase's Statutes, page 1598. This Act makes further provision for protection of the Ohio canals and authorizes the canal commissioners to cut a navigable side-cut or branch canal from the main canal to enter the Muskingum River at or near Dresden, and also to construct or permit to be constructed a similar branch between the Miami Canal and the Town of Hamilton, Ohio.

Section 5 of this Act, for the first time apparently, gives express authority to sell water from the canals for hydraulic purposes, in the following words:

> "That whenever, in the opinion of the board of canal commissioners, any water may be spared from any state canal or works connected therewith without injury to the navigation or safety of such canal, the board may order a sale of such surplus water for a term of years in their discretion to the person who shall bid the highest annual rent therefor; provided, the same shall not in any wise interfere with the rights of individuals."

Paragraph 12. By an *Act of Congress* passed May 24, 1828, Volume 4, Statutes at Large, page 305, the United States donated large tracts of land to the State of Ohio and authorized Ohio to sell such lands and use

the funds in extending the Miami Canal from Dayton and the Mad River to Lake Erie. This Act required the canal to be completed within a certain time and attached certain other conditions to the aid given by Congress, but on April 2, 1830, 4 Statutes at Large, page 393, Congress extended indefinitely the time in which to complete the canal from Dayton to Lake Erie, and provided that if Ohio should devote lands donated or the money from the sale of such lands to any other purpose than construction of the canal before completion thereof, then Ohio must pay the United States for said lands at the same rate as should be received by Ohio for the same.

Paragraph 13. The *eleventh Act* of the General Assembly of Ohio was passed December 22, 1828, entitled "An Act declaring the assent of the State of Ohio to the provisions and conditions of an Act of Congress," meaning the Act of Congress mentioned next above.

Paragraph 14. The *twelfth Act* of the General Assembly was passed February 9, 1830, entitled "An Act to authorize canal commissioners to examine into the practicability of extending the Miami line of the canal from Mad River near Dayton to Defiance and the mouth of the Auglaize River." (Volume 3, Chase's Statutes, page 1644.)

This Act made it the duty of the canal commissioners to employ competent engineers and assistants, proceed to examine and ascertain the practicability of extending, and if found practicable, the expense of extending the Miami Canal from a point near Dayton to Defiance on the Miami of the Lake; and provided that the expense should be paid out of the sale of Congress

land granted the state to aid in constructing the canal from Dayton to Lake Erie.

Paragraph 15. The *thirteenth Act* was passed February 18, 1830, entitled "An act in addition to the several Acts for the protection of the Ohio canals and other purposes." (Volume 3, Chase's Statutes, page 1659.)

Section 1 of this Act provides that no person shall draw any water from the canals of the state for any purpose nor use any water power created by the construction of any dam or feeder nor use any water for any hydraulic purpose from the canals unless such person shall have purchased from the canal commissioners the right to use such water for hydraulic power.

Section 2 prescribes a penalty and manner of recovering the same for violating the above.

Sections 3 to 7, inclusive, being all the remaining sections of the Act, provide as follows:

> "Sec. 3. That whenever, in the opinion of the board of canal commissioners, there shall be surplus water in either of the canals, or in the feeders, or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the state, over and above the quantity of water which may be required for the purposes of navigation, the said commissioners may order such surplus water, and any lands granted to, or purchased by the state, for the purpose of using the same, or such part thereof as they may deem expedient, to be sold for hydraulic purposes; subject to such conditions and reservations as they may consider necessary and proper, either in perpetuity, or for a limited number of years, for a certain annual rent or otherwise, as they may deem most beneficial for the interests of the state.

Sec. 4. That the provisions of the foregoing section shall extend to and include the water passing around locks, from one level to another, on either of the canals of this state.

Sec. 5. That no hydraulic power, nor right to the use of any water, shall be sold, leased, or conveyed, except such as shall accrue from the surplus water of the canal, feeders or dams or from the water passing around any lock, after supplying the full quantity necessary for the purposes of navigation.

Sec. 6. That every lease, grant, or conveyance of water power shall contain a reservation and condition, that the state or its authorized agents may, at any time, resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purposes of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect the navigation of either of the canals, feeders or streams, from which the water shall be taken for such hydraulic purposes; and whenever such privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeable to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded, or remitted to the purchaser or lessee, his heirs or assigns.

Sec. 7. All moneys received for the rent or sale of any hydraulic power granted or conveyed under the provisions of this Act shall be paid into the state treasury, and constitute a part of the canal fund, and shall be subject to the same rules and regulations as are prescribed in the sixth section of the Act to provide for the internal improvement of the State of Ohio by navigable canals."

Paragraph 16. The *fourteenth Act* was passed by the General Assembly of Ohio, February 23, 1830, 28 O.

L. 61, entitled "An Act constituting proceeds of sales of canal lands a portion of the general canal fund."

By this Act the proceeds of sales of canal lands granted to Ohio by Congress, as shown above, were constituted and made a portion of the general canal fund.

Paragraph 17. The *fifteenth Act* of the General Assembly was passed March 3, 1831, Chase's Statutes, Volume 3, page 1862, entitled "An Act to provide for the purchase of water privileges."

This Act provides as follows:

> "That where any feeder to either of the canals of this state, from any stream which is not navigable and a public highway, has been constructed, or may hereafter be constructed, at the expense of the state, by which a greater quantity of water may be introduced than is required for the purposes of navigation, thereby creating valuable hydraulic privileges, either on said feeder or on the canal receiving water therefrom; and where the introduction of such additional quantity of water will injure mills or mill sites on such stream between the point where the water is to be taken out, and the point at which it is to be returned into such stream; the canal commissioners shall be authorized to purchase for, and on behalf of the state, any such mill or mill site so liable to be injured, or the right to take from such stream such additional quantity of water, as either may be deemed best for the interest of the state; provided the sum to be paid for such mill, mill site or privilege, shall in no case exceed two-thirds of the sum for which the commissioners shall have ascertained the hydraulic privileges, to be supplied by such additional quantity of water can be sold; or said commissioners may at their option, convey to any owners of any mill or mill site, so liable to be injured as aforesaid, a part of the water power

> to be created as aforesaid, as a compensation for the damages sustained by the taking such additional quantity of water from such streams."

Paragraph 18. The *sixteenth Act* was passed by the General Assembly on December 31, 1831, 30 O. L. 14, Volume 3, Chase's Statutes, page 1915, entitled "An Act to authorize the selection, location, sale and application of the proceeds of lands granted by Congress to aid the State of Ohio in extending the Miami Canal."

Section 1 of this Act authorizes the governor to cause to be selected and located as early as practicable the lands granted by Congress to aid Ohio in extending the Miami Canal.

Section 2 declares that the line of canal as then run and reported to the last General Assembly from Mad River at or near Dayton to Defiance at the mouth of the Auglaize River,

> "be and the same is hereby located and agreed upon as the route of said canal, and the person or persons authorized by the governor to make such selection or location shall be governed by such line,"

and the Act of Congress passed May 24, 1828, and the Act supplemental thereto, passed April 2, 1830. The Act then provides for the sale of such lands after due selection thereof as aforesaid.

Section 9 of the Act directs

> "that so soon as there shall be paid into the state treasury of the avails of said lands such sum as the commissioners of the canal fund may think sufficient to justify the commencement of the work within the provisions of the said grant, they shall notify the canal commissioners thereof, who shall proceed to put under contract such part of said

canal commencing at or near Dayton and extending north on the line referred to in this Act as the money then in the treasury for that purpose will justify; and they shall from time to time thereafter, as the avails of said lands may be paid into the treasury, expend the same in the extension of said canal until the whole of said avails shall be expended."

Paragraph 19. The *seventeenth Act* was passed February 13, 1832, Volume 3, Chase's Statutes, page 1917, entitled "An Act to amend the Act to provide for the internal improvement of the State of Ohio by navigable canals."

This Act authorized canal commissioners to enter upon and take possession of and use any lands, waters, streams and materials necessary for making repairs or for the improvement of the canals of the state, the feeders, dykes, locks, dams, bridges and other works connected therewith as they might think proper for making such repairs, and it provided that compensation should be made for the property thus taken in the same way as the original Act for construction passed February 4, 1825.

The Congress of the United States having granted lands in Ohio to the State of Indiana to aid in building the Wabash and Erie Canal, Indiana proposed to Ohio to transfer to Ohio such part of the land granted by Congress to Indiana as lay within Ohio if Ohio would build the Wabash and Erie Canal from the west Ohio state line to Lake Erie. Section 4 of the Act of Congress, passed May 24, 1828, 4 Statutes at Large, page 305, authorized Indiana to make such conveyance upon such terms as might be agreed upon by the two states. On

February 1, 1834, Indiana, through resolution of her General Assembly, conveyed to Ohio her right, title and interest to lands in Ohio which Indiana had received from Congress.

Paragraph 20. The *eighteenth Act*, in this case a resolution, was passed by the General Assembly of Ohio on February 24, 1834, accepting the conveyance of Ohio lands by the State of Indiana to the State of Ohio, thus giving to Ohio two hundred ninety-two thousand two hundred twenty-three (292,223) acres of land. This body of land and the grants made by Congress direct to Ohio made a total of one million two hundred thirty thousand five hundred twenty-one (1,230,521) acres of land to be sold for aid in construction of Ohio's canals.

Paragraph 21. The *nineteenth Act* was passed by the General Assembly of Ohio, February 27, 1834, 32 O. L. 213. It provided:

> "That all moneys arising from the sale of said lands or from grants or donations in aid of said work, together with the net proceeds of all tolls, fines and *water rents* derived from the canal north of Dayton shall be subject to the control of the commissioners of the canal fund as other canal funds are by law to be applied to the extension of said canal."

Paragraph 22. The *twentieth Act* was passed by the General Assembly March 3, 1834, 32 O. L. 308. By this Act the board of public works, then the successor to the board of canal commissioners, were to establish the line of the Wabash and Erie Canal from the east line of the State of Indiana to some suitable point for the termination of the same below the rapids of the Maumee River into Lake Erie. The Act directs the board of public

works to put the work under contract and carry it along from time to time as funds from the sale of lands should be received, or other moneys supplied. The work of construction of this canal began in 1837 and it was completed from Indiana's east line to Lake Erie in 1842.

Paragraph 23. The *twenty-first Act* was passed by the General Assembly of Ohio, March 8, 1836, 34 O. L. 331, entitled "An Act to provide for the extension and completion of the Miami Canal north of Dayton."

This Act gave authority for the purpose indicated by the above title and to borrow Two Hundred Thousand Dollars ($200,000.00) for each of the years 1836 to 1838, both inclusive, and Three Hundred Thousand Dollars ($300,000.00) in each of the years 1839 to 1841, inclusive.

Paragraph 24. The *twenty-second Act* was passed by the General Assembly, January 12, 1837, 35 O. L. 6, entitled "An Act appropriating money for the purchase of suitable lands for hydraulic purposes."

By this Act the General Assembly authorized an expenditure of the sum of Twenty-five Thousand Dollars ($25,000.00) and appropriated the same to be expended in purchasing suitable land along the Ohio canals where surplus water could be profitably used for hydraulic purposes.

Paragraph 25. The *twenty-third Act* was passed by the General Assembly April 3, 1837, 35 O. L. 114, and authorized and appropriated money for the same purposes as stated next above in developing hydraulic power not exceeding Six Thousand Dollars ($6,000.00) on the Ohio Canal, not exceeding Nine Thousand Dollars ($9,000.00) on the Miami Canal south, and not exceeding Five Thousand Dollars ($5,000.00) on the same canal

north of Dayton, in addition to the sums theretofore appropriated.

Paragraph 26. The *twenty-fourth Act* was passed by the General Assembly of Ohio March 19, 1838, 36 O. L. 85, Swan's Statutes of Ohio, 1841, pages 166 to 170, entitled "An Act relating to the management and sale of certain lands of the State of Ohio."

Section 13 of this Act provides for the purchase of land necessary to the proper use of any water power on the Miami Canal as follows:

> "That it shall be the duty of the acting commissioner on the Miami Canal to make selection of such lots of land as may be necessary to the proper use of any water power which may be created by the construction of said Miami Canal, and any works connected therewith, and any other lots which may be necessary to supply timber for the construction and repair of the canal; and shall furnish the register of the Lima land office with a list of all such selections before the sale of any of said lands, and such selections shall thereupon be by such register entered on record, and reserved from sale; and the state hereby reserves the right to make said canals through the lands sold under authority of this Act, clearing all claims for damages done to said lands."

Paragraph 27. The *twenty-fifth Act* was passed by the General Assembly March 23, 1840, 38 O. L. 87, Swan's Statutes of Ohio, 1841, pages 174 to 200, entitled "An Act to provide for the protection of the canals of the State of Ohio; the regulation of the navigation thereof and for the collection of tolls."

This Act makes very clear provisions for protection and management of the Ohio canals, including the Miami and Erie Canal, and in Section 18 thereof re-

enacts the prohibition against taking water from the canal without permission of the board of public works, as found in the Act of February 18, 1830, and it re-enacts Sections 3 to 7, inclusive, above quoted of that Act of February 18, 1830, but in this Act these sections become Sections 20 to 24, inclusive. The only change is that in this Act of March 23, 1840, the board of canal commissioners is designated as the "Board of Public Works."

The above mentioned sections 20 to 24, inclusive of said Act of March 23, 1840, read as follows:

> "20. Sect. XX. Whenever, in the opinion of board of public works, there shall be surplus water in either of the canals, or in the feeders, or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the state, over and above the quantity of water which may be required for the purpose of navigation, the said commissioners may order such surplus water, and any lands granted to, or purchased by the state, for the purpose of using the same, or such part thereof as they may deem expedient, to be sold for hydraulic purposes, subject to such conditions and reservations as they may consider necessary and proper, either in perpetuity or for a limited number of years, for a certain annual rent, or otherwise, as they may deem most beneficial for the interests of the state.
>
> 21. Sect. XXI. The provisions of the foregoing section shall extend to and include the water passing round locks, from one level to another, on either of the canals of this state.
>
> 22. Sect. XXII. No hydraulic power, nor right to the use of any water, shall be sold, leased or conveyed, except such as shall accrue from the surplus water of the canal, feeders or dams, or from

the water passing round any lock, after supplying the full quantity necessary for the purposes of navigation.

23. Sect. XXIII. Every lease, grant or conveyance of water power, shall contain a reservation and condition, that the state, or its authorized agents, may, at any time resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purposes of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with, and injuriously affect the navigation of either of the canals, feeders or streams from which the water shall be taken for such hydraulic purposes; and whenever such privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded, or remitted to the purchaser or lessee, his heirs or assigns.

24. Sect. XXIV. All moneys received for the rent or sale of any hydraulic power, granted or conveyed under the provisions of this Act, shall be paid into the state treasury, and constitute a part of the canal fund; and shall be subject to the same rules and regulations as are prescribed in the sixth section of the Act to provide for the internal improvement of the State of Ohio, by navigable canals."

These Sections 20 to 24, inclusive, of the Act of March 23, 1840, here in question, afterwards without change became Sections 7775 to 7779 respectively, both inclusive, of the Revised Statutes of Ohio of 1880, and thereafter they became without change Sections 14,009 to 14,013 of the General Code of 1910. They remained without amendment or change until March 21, 1917, 107

O. L., page 418. In this last Act Section 14,009, General Code, was amended, limiting leases to twenty-five (25) years' duration. These Sections 14009 to 14013, inclusive, of the General Code are found in Volume 3 of Page's Annotated Ohio General Code, as amended in 107 O. L., page 418.

Many of the above old Acts are in a manner codified and a considerable part of the history of the canals is compiled in Swan's Statutes of Ohio 1841, pages 744 to 764, inclusive.

Paragraph 28. The *twenty-sixth Act* was passed by the General Assembly March 7, 1842, 40 O. L. 72. In Section 12 of this Act the board of public works was directed to select any and all canal lands belonging to the state as might be necessary to the use of water power created by the Wabash and Erie Canal or the Miami Canal or feeders or reservoirs and to select any other lots which might be necessary to supply timber for the construction and repair of the canals. Thus it will be seen through Acts already quoted that contemporaneously with the authorization of the construction of each of the three sections of the Miami and Erie Canal provision was made by the General Assembly for the acquirement of any lands necessary at any point on each of these three sections of this canal for the development of water power wherever such power might be developed and large appropriations were made in each case for that purpose.

Section 12 of the above mentioned Act, passed March 7, 1842, 40 O. L. 72, reads as follows:

> "Sec. 12. That it shall be the duty of the board of public works to make selection of such lots of land as may be necessary to the use of any water

power which may be created by the Wabash and Erie Canal, or the Miami Canal, or feeders, or reservoirs therewith connected, and any other lots which may be necessary to supply timber for the construction and repair of the canal, and to furnish the register of the proper land office a list of all such selections, before the day fixed for the sale of any such lands; and such selections shall, thereupon, be entered upon record by the register, and reserved from sale; and the state hereby reserves the right to make the canals through the lands sold, under the authority of this Act, clear of all claims for damages done to said lands."

Paragraph 29. The *twenty-seventh Act* was passed by the General Assembly on February 28, 1843, 41 O. L. 43. This Act provided for and directed the completion of the Miami Extension Canal in all of its parts from the Mad River at Dayton, Ohio, north to the Auglaize River and the City of Defiance, not then under contract, and this extension was completed in the year 1845.

Paragraph 30. The *twenty eighth Act* was passed by the General Assembly March 14, 1849, 47 O. L. 44, entitled:

"An Act in relation to the Miami Canal, the Miami Extension and the Wabash and Erie Canal."

We have already referred to this Act as being the Act which placed all three of these sections named in the above title under one name, the "Miami and Erie Canal."

LEASING OF THE ENTIRE PUBLIC WORKS OF THE STATE

Paragraph 31. Through an Act of the General Assembly passed May 8, 1861, 58 O. L. 117, entitled:

"An Act to provite for the leasing of the public works of the state,"

all such public works were leased for a period of ten years, the Act providing that the leases should be for that term of years from the day of the approval of the bond required by the Act. The public works of the state are named in this Act and they are as follows: Miami and Erie Canal, Ohio Canal, Walhonding Canal, Hocking Canal, Sandy and Beaver Canal, Muskingum Improvement and Western Reserve and Maumee Road, and all the side-cuts, feeders, reservoirs, lock-houses, collectors' offices, way-locks and leases of surplus water connected with the same or pertaining thereto and owned by the state for the purpose of being used in connection therewith, with the right to have additional surplus water; all moneys derived from the leasing of said public works to be paid into the treasury of the state.

A lease was executed to five men under this Act and put into effect. The public works were taken over by the lessees and operated for the period of ten years.

The Act of course provides all the details for the leasing, the terms of the lease, the duties and obligations both of the lessees and of the state under the lease.

Section 17 of the Act is as follows:

"Sec. 17. This Act shall take effect on its passage: Provided, that nothing in this Act shall preclude the state from granting permission to the City of Cincinnati to enter upon, and to improve as a public highway, and for sewerage purposes, all or any of that part of the Miami and Erie Canal which extends from the east side of Broadway, in said city, to the Ohio River, the state hereby reserving the right to make such grant."

On April 11, 1867, 64 O. L. 330, the General Assembly passed a joint resolution extending this lease of all public works for another period of ten years from and after June 1, 1871.

Two and one-half years before the end of the extension, the state took the public works back into its possession and no other leasing of the entire public works was ever made, but the state continued to operate them in the same manner as they had been operated prior to such leasing thereof.

ACTS OF THE GENERAL ASSEMBLY OF OHIO ABANDONING SECTIONS OF THE MIAMI AND ERIE CANAL

Paragraph 32. The first Act abandoning a portion of the Miami and Erie Canal was passed March 24, 1863, 60 O. L. 44. It is entitled and reads as follows:

> "An Act to authorize the City of Cincinnati to enter upon and occupy a part of the Miami and Erie Canal as a public highway and for sewerage purposes."
>
> "Section 1. Be it enacted by the General Assembly of the State of Ohio, that authority and permission shall be granted, in the manner hereinafter pointed out, to the City of Cincinnati, to enter upon, improve and occupy forever, as a public highway and for sewerage purposes, all or any of that part of the Miami and Erie Canal which extends from the east side of Broadway, in said city, to the Ohio River, including the width thereof, as owned or held by the state; but the said grant shall be made subject to all outstanding rights or claims, if any, with which it may conflict; provided, that no work shall be done by said city authorities on the premises hereby granted until the

plan of improvement shall be approved of by the board of public works.

Section 2. The said grant shall not extend to the revenues derived from the water privileges in said canal, which are hereby expressly reserved; and the said grant shall be made upon the further condition that the said city, in the use as aforesaid of all or any of said portion of said canal, shall not obstruct the flow of water through said canal, nor destroy nor injure the present supply of said water for milling purposes, and that said city shall be liable for all damages that may accrue from such obstruction or injury; but it is not intended hereby to relieve the lessees of said canal, or their assignees, from any responsibilities imposed upon them by 'an Act to provide for leasing the public works of the state,' passed May 8, 1861, or by the instrument of lease executed in pursuance of said Act, except as and to the extent that they may be interfered with, as said city may, from time to time enter upon, improve, and occupy any part of said grant.

Section 3. Whenever the council of said city, by a vote of not less than two-thirds of the whole number of members thereof, shall decide to use said canal as herein authorized, the said council shall make known its decision to the governor, and thereupon the governor, in behalf of the state, shall execute and deliver to the City of Cincinnati a grant of the part of said canal herein described for the uses and purposes before mentioned, and upon the terms and conditions specified in this Act. The attorney general shall prepare the form of said grant.

Section 4. This Act shall not be construed to confer upon said city any new power of taxation, or to borrow money, or to contract debts in the use as aforesaid of said canal.

Section 5. This Act shall take effect from and after its passage."

Paragraph 33. The second abandonment Act was passed March 26, 1864, 61 O. L. 74. It is entitled and reads as follows:

"An Act to authorize the City of Toledo to enter upon and occupy a part of the Miami and Erie Canal as a public highway, and for sewerage and water purposes."

"Section 1. Be it enacted by the General Assembly of the State of Ohio, that authority and permission shall be granted in the manner hereinafter pointed out, to the City of Toledo to enter upon, improve and occupy forever as a public highway and for the use of water pipes, and for sewerage purposes, all that part of the Miami and Erie Canal (known as the Manhattan branch), which extends from a point to be hereafter designated by the board of public works, at or near the southerly bank of Swan Creek, where the aqueduct crosses the said creek and continuing to the Maumee River, including the width thereof as owned and held by the state; but the said grant shall be made subject to all outstanding rights or claims, if any, with which it may conflict; provided, that all material composing the aqueduct, and the locks at the terminus of said canal, are hereby expressly reserved to the state, to be removed by her agents whenever the City of Toledo, by the authority of this grant, enters upon and occupies said canal.

Section 2. That the said city shall be liable for all damages that may accrue from the vacation of said canal; but it is not intended hereby to relieve the lessees of said canal, or their assigns, from any responsibilities imposed upon them by 'an Act to provide for the leasing of the public works of the state' passed May 8th, 1861, or by the instrument of lease executed in pursuance of said Act, except as and to the extent that they may be interfered with as said city may enter upon and occupy said grant.

Section 3. Whenever the city council of said

city, by a vote of not less than two-thirds of the whole number of members thereof, shall decide to use said canal as herein authorized, the said council shall make known the said decision to the governor, and deposit with him a written release executed by the lessees of the public works, relinquishing any rights they may have in that part of said canal, or a bond duly executed and to the satisfaction of the governor, indemnifying the state from all liabilities and damages which may result from said vacation, and thereupon the governor, in behalf of the state, shall execute and deliver to the City of Toledo a grant of that part of the canal herein described for the uses and purposes before mentioned, and upon the terms and conditions specified in this Act. The attorney general shall prepare the form of said grant, and also the form of said release or bond.

Section 4. This Act shall not be construed to confer upon said city any new sources of taxation or to borrow money, or to contract debts in the use as aforesaid of said canal.

Section 5. This Act shall take effect from and after its passage."

Paragraph 34. In Sections 44, 45, 46, 49 and 50, both inclusive, of Stipulation Exhibit No. 23 (Record 159) are listed other Acts of abandonment as indicated in those paragraphs aside from the two Acts of abandonment above quoted in full. We do not set out these abandonment Acts here as listed, as above stated, because, except as to the particular property abandoned by them respectively, they are in their respective terms and conditions of abandonment practically the same as the two abandonment Acts above quoted. The third and fourth abandonment Acts are listed at Sections 47 and 48, Stipulation Exhibit 23 (R. 159), and affect the Wa-

bash and Erie Canal (afterward Miami and Erie) in Paulding County.

Paragraph 35. The fifth abandonment Act was passed January 22, 1920, 108 O. L. Part 2, pages 1138 to 1141. It is entitled and reads as follows:

"(House Bill No. 560)

AN ACT

To abandon a portion of the Miami and Erie Canal in Lucas County, Ohio, and to provide for the sale or lease of the same to the City of Toledo, Ohio.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That the portion of the Miami and Erie Canal in Lucas County, Ohio, that is described as follows, be and the same is abandoned for both canal and hydraulic purposes, subject, however, to the rights hereinafter in Sections 6 and 7 provided for:

Commencing at the foot of the outlet lock of the Miami and Erie Canal in the City of Toledo, Lucas County, Ohio, being Lock No. 52, of said canal, numbering north from Loramie Summit, and extending thence westerly 1,200 feet, including the full width of the bed and banks thereof as defined by S. A. Buchanan's survey of said canal made under the direction of the state board of public works in the summer of 1909; also that portion of said Miami and Erie Canal commencing at the inner face of the southerly abutment of the old aqueduct over Swan Creek on the Manhattan branch of said Miami and Erie Canal, and extending thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof as defined by Buchanan's survey, for a distance of 45,683 feet to a point just below the head of the Maumee side-cut, near Maumee, Ohio, excepting therefrom any portion of the same that may possibly be required in

the construction of any ship or barge canal, under authority of legislation passed or to be passed by the Congress of the United States, or by the State of Ohio.

Section 2. Within four months after the passage of this Act, the superintendent of public works shall cause such surveys to be made of said abandoned canal property as in his judgment is necessary for the carrying out of the provisions of this Act, together with such plats of the same as will facilitate the sale or leasing of said canal lands, which plats shall be preserved as permanent records in the office of the department of public works, at Columbus, Ohio.

Section 3. As soon as may be convenient, after the completion of the surveys and plats of the government engineers locating the line of said enlarged canal, and the report of the engineer having charge of such surveys has been filed with the secretary of war, showing what part of such canal, if any, will be required in the construction of the proposed enlarged canal, the governor shall appoint two disinterested freeholders, neither of whom shall be residents of Lucas County, but residents of the State of Ohio, who in conjunction with the superintendent of public works, shall proceed within thirty days after such appointments are made, to appraise the portion of said abandoned canal property that will not be required for the purposes of the proposed enlarged canal, as shown by the report of the government engineers relating thereto at its true value in money, and shall file in writing certified copies of such appraisement with the governor of the State of Ohio, and the mayor of the City of Toledo, Lucas County, Ohio, within thirty days after they have qualified as such appraisers by taking an oath of office.

Section 4. Said appraisers, other than the superintendent of public works, shall each be en-

titled to compensation at the rate of twenty-five dollars per day and necessary expenses for the time actually required in making such appraisement, all of which expenses shall be paid by the City of Toledo; one-half of the amount so paid shall be credited upon the purchase price to be paid the State of Ohio when a sale or lease to the said City of Toledo is completed. In case a vacancy occurs in such appraisal board, such vacancy shall be filled in the same manner in which the original appointments were made.

Section 5. The City of Toledo shall have the option of either leasing or purchasing the portion of said abandoned canal property not required for the construction of the proposed enlarged canal, appraisers herein arranged for, provided that the city council of said city shall, within three years after said appraisement has been filed with the governor and mayor, as herein provided, signifies by resolution of its council, its acceptance of such appraisement and its intention to either purchase or lease said abandoned canal property in accordance with the terms of this Act.

Section 6. In case the City of Toledo signifies its intention to purchase said property, the governor is hereby authorized, as soon as the purchase price for said canal property has been paid into the state treasury, to execute a deed conveying said property in fee simple to the City of Toledo, Lucas County, Ohio, but excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, and the rights of said owners to a renewal of said existing lease, which deed before delivery shall first be approved by the attorney general.

Section 7. In case the said City of Toledo, by resolution of its council, shall signify its preference for a lease of said canal property, the superintendent of public works, subject to the approval of the governor and attorney general, is hereby

authorized to execute and deliver to the said City of Toledo, a lease conveying to said city all the right, title and interest of the State of Ohio in and to said abandoned canal property, either in perpetuity or for a term of years, excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, and the rights of said owners to a renewal of said existing leases, and in case the state's lessees are at any time, under the terms of this Act, deprived of their water privileges, the City of Toledo shall pay such lessees a fair compensation for the loss of the water to which they are entitled, and in case the amount of compensation cannot mutually be agreed upon, the City of Toledo shall proceed under the provisions of the General Code, to condemn the rights of such lessees for the use of said municipality; provided, however, that no new leases shall be executed for either water or land rights upon any portion of the canal property described in Section 1 hereof during the three-year period referred to in Section 5 hereof; and provided further, that this Act shall not be construed as granting the lessees any rights in addition to those granted them in their existing leases.

Section 8. Prior to the execution of any deed or lease conveying to the said City of Toledo the lands herein described the City of Toledo shall enter into a contract with the State of Ohio, which contract shall be executed on the part of the State of Ohio by the governor and attorney general; that the said City of Toledo shall provide the right-of-way and construct a channel with suitable locks, to connect the Miami and Erie Canal with the Maumee River on such alignment, near Maumee City, as the superintendent of public works of the State of Ohio may designate, said connecting channel and locks to be completed within two years from the date of notification to said City of Toledo, by the superintendent of public works requesting that said improvements be

made, but such request shall not be made until the State of Ohio, its lessees or assigns, or the federal government of the United States, have arranged for the resumption of navigation in the existing canal upon a scale to justify the expenditure of the money required for making such connecting channel; the City of Toledo, however, shall construct all bulkheads or embankments necessary to cut off the flow of water at or near the southerly end of the canal herein abandoned, and likewise construct all overflow wasteweirs and necessary channels required to care for the surplus water that must be wasted at some point near the Maumee side-cut; all of which work must be done to the full satisfaction of the superintendent of public works, and in accordance with plans to be approved by him prior to the commencement of the work.

Section 9. In case a lease for the canal property herein abandoned is made to the City of Toledo, the annual rental therefor shall be at the rate of four per cent per annum upon the appraisement as fixed by the appraisers appointed by the governor, payable in semi-annual installments, on the first day of May and November of each and every year.

Carl R. Kimball,
Speaker of the House of Representatives;
Clarence J. Brown,
President of the Senate.

Passed January 22nd, 1920.
Approved February 4th, 1920.

James M. Cox, Governor.

Filed in the office of the secretary of state, at Columbus, Ohio, on the 4th day of February, A. D. 1920."

The above quoted Act is the Act construed by the United States Circuit Court of Appeals for the Sixth Circuit, in the case of The Maumee Valley Electric Com-

pany vs. The City of Toledo et al., 13 Federal Reporter, 2nd Series, pages 98 to 105.

Paragraph 36. The sixth abandonment Act was passed on March 25th, 1925, 111 O. L. 208, 214, entitled:

"An Act to abandon for canal purposes that portion of the Miami and Erie Canal between the Maumee River at Defiance, Defiance County, Ohio, and a point five hundred feet north of the Middletown Dam near the north corporation line of the City of Middletown, Ohio, and to provide for the leasing of certain portions of the same, to cities, villages and other political subdivisions of the state and for granting of leases outside of municipalities, etc."

Paragraph 37. The seventh abandonment Act was passed March 27, 1925, 111 O. L., pages 367 to 370. It is entitled and reads as follows:

"(Amended Senate Bill No. 148)

AN ACT

To abandon a portion of the Miami and Erie Canal in Lucas County, Ohio, and to provide for the sale of the same to the county commissioners of Lucas County, Ohio.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That the portion of the Miami and Erie Canal in Lucas County, Ohio, that is described as follows, be and the same is hereby abandoned for both canal and hydraulic purposes, subject, however, to the rights hereinafter in Sections 5 and 6 provided for:

Commencing at a point just below the head of the Maumee side-cut near Maumee, Ohio, thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof as defined by Buchanan's survey, to a point where said canal joins with the Maumee River on the westerly side thereof in Providence

Township, Lucas County, Ohio, excepting therefrom any portion of any state lot now under an existing lease, and likewise excepting therefrom any portion of the same that may be required in the construction of any ship or barge canal, under authority of legislation passed or to be passed by the congress of the United States, or by the State of Ohio.

Section 2. Within four months after the passage of this Act, the governor shall appoint two disinterested freeholders neither of whom shall be residents of Lucas County, Ohio, but residents of the State of Ohio, who, in conjunction with the superintendent of public works, shall proceed within thirty days after such appointments are made to appraise the portion of said abandoned canal property at its true value in money, and to take into consideration in said appraisement the revenue that can be derived from the use of said canal for any purpose, and the amount fixed by two of said appraisers shall be the appraised value thereof, and shall file in writing certified copies of such appraisement with the governor of the State of Ohio and the county commissioners of Lucas County, Ohio, within thirty days after they have qualified as such appraisers by taking oath of office.

Section 3. Said appraisers, other than the superintendent of public works, shall each be entitled to compensation at the rate of twelve dollars per day and necessary expenses for the time actually required in making such appraisement, all of which expenses shall be paid by the county commissioners of Lucas County, Ohio; one-half of the amount so paid shall be credited upon the purchase price or rental to be paid the State of Ohio, when a sale or lease to said county commissioners of Lucas County, Ohio, is completed. In case a vacancy occurs in such appraisal, such vacancy shall be filled in the same manner in which the original appointments were made.

Section 4. The said county commissioners shall have the option of purchasing the portion of said abandoned canal property not required for the construction of the proposed enlarged canal, appraisers herein arranged for, provided that said county commissioners shall within two years after said appraisement has been filed with the governor and said board, as herein provided, signify by resolution of its board, its acceptance of such appraisement and its intention to purchase said abandoned canal property in accordance with the term of this Act.

Section 5. In case the board of county commissioners of the County of Lucas, Ohio, signifies its intention to purchase said property, the governor is hereby authorized, as soon as the purchase price for said canal property has been paid into the state treasury, to execute a deed conveying said property in fee simple to the board of county commissioners of Lucas County, Ohio, but excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, including the rights of said owners to a renewal of their said existing leases and subject to all lawful claims for damages and compensation asserted by such lessees on account of the abandonment of said canal under the provisions of this Act including claims of lessees who are now receiving water at points situate on that part of said canal which has theretofore been sold and conveyed to the City of Toledo under and pursuant to the provisions of House Bill No. 560 enacted by the General Assembly of Ohio on the 22nd day of January, 1920, and said board of county commissioners of Lucas County, Ohio, shall hold safe and keep the State of Ohio free and harmless from said damage claims, which deed, before delivery, shall first be approved by the attorney general.

Section 6. In case the said board of county commissioners, by resolution of its board, shall signify its preference for a lease of said canal prop-

erty, the superintendent of public works, subject to the approval of the governor and attorney general, is hereby authorized to execute and deliver to the said county commissioners, a lease conveying to said county commissioners all the right, title and interest of the State of Ohio in and to said abandoned canal property, either in perpetuity or for a term of years, excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both including the rights of said owners to a renewal of their said existing leases and subject to all lawful claims for damages and compensation asserted by such lessees on account of the abandonment of said canal, as provided in Section 5 of this Act; provided, however, that no new leases shall be executed for either water or land rights upon any portion of the canal property described in Section 1 hereof, during the two years period refered to in Section 4 hereof.

All valid claims for damages and compensation as provided in Sections 5 and 6 and this Act shall be paid by the said board of county commissioners; and provided further, that this Act shall not be construed as granting the lessees any rights in addition to those granted them in their existing leases.

Section 7. In case a lease for the canal property herein abandoned is made to the county commissioners, the annual rental therefor shall be at the rate of four per cent per annum upon the appraisement as fixed by the appraisers appointed by the governor, payable in semi-annual installments, on the first day of May and November of each and every year.

Section 8. Provided that before the deed or lease of that part of said canal described in Section 1 of this Act shall be executed and before the county commissioners of Lucas County may avail themselves of the privileges of this Act, said county commissioners shall subsequent to the ap-

praisement provided in Section 2 of this Act, provide by resolution a time and place of hearing for the purpose of filing claims for damages and compensation by all owners of existing leases of canal lands or water or both and also the owners of the right under lawful renewals of such existing leases for the loss to be suffered by them by reason of such abandonment and the consequent extinguishment of the land and water privileges now enjoyed and hereafter to be enjoyed by them under and by virtue of their said leases including any renewals thereof.

Such hearing shall be fixed not exceeding six months from the time of filing such appraisement, and at least three months' notice thereof shall be served upon all of said state lessees in the same manner as provided by the law in the service of summons in civil cases. No claim for damages and compensation shall be allowed unless said claim or claims are duly filed with the said board of county commissioners prior to the time of such hearing.

If such claims are settled or adjudicated as hereinafter provided in a court of law, the court or county commissioners of Lucas County may then proceed to lease or buy that portion of the Miami and Erie Canal described in Section 1 hereof, in the manner provided by this Act. In order to adjudicate said damages and compensation to be paid for the rights under said leases, the board of county commissioners of Lucas County are hereby authorized and empowered to appropriate said rights by condemnation proceedings as provided by law in other cases. Upon the payment of the judgment in such cases and the compliance with the orders of the court, said county commissioners shall be vested with and succeed to all of the said rights of the owners of such leases.

Provided further that neither the passage of this Act nor any action that may be taken in pursuance thereof by the State of Ohio or any of its

officers, or by Lucas County, Ohio, or its county commissioners or other officers, shall have any effect on or be deemed or held to be a defense to any claims for damages or compensation by said lessees of the State of Ohio, secured to them under the terms of House Bill 560 passed by the General Assembly of Ohio, on January 20th, 1920, and found in Volume 108, Part 2, Ohio Laws, pages 1138 to 1141, inclusive.

Charles H. Lewis,
President of the Senate;
Harry D. Silver,
Speaker of the House of Representatives.

Passed March 27, 1925.

House of Representatives—Passed notwithstanding the objections of the governor—April 17, 1925.

Harry D. Silver
Speaker of the House of Representatives.

Senate—Passed notwithstanding the objections of the governor—April 17, 1925.

Charles H. Lewis,
President of the Senate.

Filed in the office of the secretary of state at Columbus, Ohio, on the 21st day of April, A. D. 1925.

Thad H. Brown,
Secretary of State."

This Act last quoted above covers and affects the same property which is covered and affected by the Act in question in this case. It is the same, practically, in its terms and provisions as the Act construed by the United States Circuit Court of Appeals in the above mentioned case of The Maumee Valley Electric Company vs. The City of Toledo, 13 Federal Reporter, 2nd Series, pages 98 to 105. The only real difference between the two Acts is as to the property covered and that in the Act passed

January 22, 1920, permission was given to the City of Toledo to buy the property covered by that Act, and in this Act just quoted above, permission was given to the Lucas County Commissioners to buy the property affected by this Act.

Paragraph 38. The eighth abandonment Act was passed April 21, 1927, 112 Ohio Laws, pages 388 to 390, entitled:

> "An Act to abandon for canal and hydraulic purposes that portion of the Miami and Erie Canal from a point five hundred feet north of the State Dam near the corporation line of the City of Middletown, Ohio, to the present terminus of said canal at St. Bernard, in the City of Cincinnati, Hamilton County, Ohio."

Paragraph 39. The ninth and last abandonment Act affecting Miami and Erie Canal is the Act in question in this case, passed May 11, 1927, 112 O. L., pages 360 to 363. It is entitled and reads as follows:

> "(Amended Senate Bill No. 48)
>
> AN ACT
>
> To abandon a portion of the Miami and Erie Canal in Lucas County, Ohio, and to devote the same to highway and other purposes and to repeal all Acts in conflict therewith.
>
> Be it enacted by the General Assembly of the State of Ohio:
>
> Sec. 14178. Portion of Miami & Erie Canal abandoned; description:
>
> Section 1. That the portion of the Miami and Erie Canal in Lucas County, Ohio, that is described as follows, be, and the same is hereby abandoned for both canal and hydraulic purposes. Commencing at a point just below the head of the Maumee side-cut near Maumee, Ohio, thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof,

as defined by Buchanan's survey, to a point where said canal joins with the Maumee River on the westerly side thereof, in Providence Township, Lucas County, Ohio.

Sec. 14178-1. State of Ohio reserves title to all lands and waters.

Section 2. The State of Ohio reserves unto itself, the title to all lands and waters to which it it entitled under the various Acts, providing for the construction of the Miami and Erie Canal and all lands now occupied by any part of the said Miami and Erie Canal, including all lands used for lock houses, waste ways or for other purposes and now the property of the State of Ohio.

Sec. 14178-2. Used and occupied lands to be held for the State of Ohio in fee simple.

Section 3. So much of said lands as were used and occupied by the Miami and Erie Canal shall be forever held for the State of Ohio in fee simple, and held by the state for the purpose of constructing upon the said lands, a highway, to be erected, constructed and improved at such time or times as the State of Ohio may hereafter, either by legislative enactment, or otherwise, find proper and convenient.

Sec. 14178-3. When existing leases shall become null and void.

Section 4. All leases heretofore granted to any person, firm or corporation, for canal or hydraulic purposes on that part of the Miami and Erie Canal described in Section 1 of this Act shall become and be null and void on and after sixty days from the taking effect of this Act, and all other leases for lands heretofore granted upon such portion of the canal shall be terminated according to the terms of this Act as the same can be legally done.

Sec. 14178-4. Abandoned portion shall be under supervision and control of state highway director.

Section 5. The abandoned portion of said canal shall be under the supervision and control of the state highway director, to be devoted to highway

and park uses and purposes as herein provided, and the director of highways of the State of Ohio is hereby authorized to, and he shall, within sixty days from the taking effect of this Act, drain the water of said abandoned portion and prevent the water of the Maumee River from flowing into or through said abandoned part of said canal.

Sec. 14178-5. Surveys and maps to be made.

Section 6. As soon as practicable, after this Act goes into effect, the director of highways of the State of Ohio shall cause surveys to be made of the canal property herein abandoned, together with maps and plats of the same, and of all lands used in connection with that portion of the Miami and Erie Canal, hereby abandoned, belonging to the State of Ohio, adjacent thereto, and file a copy thereof with the governor.

Sec. 14178-6. Making of plat or plan.

Section 7. The director of highways is further directed to make a plat or plan, showing the highway, its length, grades and width of so much of the canal property as may be used for such highway purposes, and all other lands adjacent thereto that may be leased for other purposes.

Sec. 14178-7. Use of lands before highway is constructed and improved.

Section 8. Until said highway shall be constructed and improved, no portion of the lands within the plat or plan showing such highway shall be leased for any purpose whatever, but until the State of Ohio shall construct and improve said lands for a highway, all municipal corporations through which said highway shall pass when completed, and the commissioners of Lucas County, Ohio, shall be permitted to use said canal lands for public purposes only, without compensation.

Sec. 14178-8. Leasing of adjacent lands; manner.

Section 9. All other lands which may be shown on said plat adjacent to said highway and which will not be used for highway purposes may be

leased under the direction of the director of highways, in the following manner:

The said director of highways shall cause said lands, not to be used for said highways, to be appraised and a report of said appraisement filed in the office of the governor, and one copy left in the office of the director of highways.

After said lands are so appraised, and upon application therefor, the lands not needed or required within said highway may be leased to any applicant, for a period not to exceed fifteen years, and with the right of renewal for an additional fifteen years, upon a rental equal to six per cent per annum upon the value of the appraisement so made, and at the end of fifteen years, said lands shall be reappraised and likewise leased to such applicant.

Provided, however, that if any municipal corporation, Lucas County, township, or other taxing district desires to lease any portion of said lands not required for said highway purposes, the same shall be leased to such taxing district upon a rental of four per cent per annum.

Said application shall be made in writing, upon forms provided for that purpose, and shall clearly describe the lands covered in said application, and shall state the term of years for which such lease is desired, and shall be signed by a public officer, duly authorized by the public authorities of the city, village, or other political subdivision making said application, and when the same shall be desired by any political subdivision.

Before granting any lease to any private individual, notice of the filing of such application shall be given to the public officials of any municipal corporation, county, township, or other political subdivision in which said lands are located.

If, within thirty (30) days after such notice such officer of the political subdivision makes no application to lease said lands, the same may be leased to private persons, firms or corporations,

and such application made by such private persons, firm or corporation shall be made in writing upon forms provided for that purpose, describing the lands covered in the application, the term of years for which the lease is desired, and be signed by such person, firm or corporation, and filed in the office of the director of highways of the State of Ohio.

In the event that any leases granted herein are renewed at the expiration thereof, the same shall provide for a reappraisement by proper state authorities, upon the expiration of each fifteen-year period, and the rate of rental upon such new appraisement shall be made in the same manner as the original appraisement.

Sec. 14178-9. Right to remove bridges, to grade and construct roads and streets.

Section 10. The county commissionrs of Lucas County, the council or other legislative body of any municipality or township through which said abandoned canal passes, shall have, and are hereby granted, the right to remove existing bridges, crossing said abandoned portion of said canal over which county roads, city or village streets or township roads pass, and to grade and to construct such roads and streets across the channel of said abandoned portion by necessary fills and grades in the channel thereof and to such grade as shall be approved by the director of highways, and the county commissioners of Lucas County are authorized to drain the water of said abandoned portion, and to prevent the water from the river from flowing into or through said abandoned part of said canal, but reserving all rights of the State of Ohio across said roadways for any and all purposes said state or its grantees may hereafter desire to use said roadway, not in conflict therewith.

Sec. 14178-10. Sale prohibited; exception.

Section 11. No portion of the canal lands and lands adjacent thereto and herein abandoned shall

ever be sold, except by specific authority of the General Assembly of Ohio.

Sec. 14178-11. Defining term highway director.

Section 12. The term highway director, as used herein, shall be construed to mean any officer, commission, board or department that may be established by law for the control of public highways.

Sec. 14178-12. Repealing section.

Section 13. That all acts or parts of acts in conflict with this Act, be and the same are hereby repealed.

O. C. Gray,
Speaker of the House of Representatives.
Earl D. Bloom,
President of the Senate.

Passed April 4, 1927.

Senate—Passed notwithstanding the objections of the governor, May 10, 1927.

Earl D. Bloom,
President of the Senate.

House of Representatives—Passed, notwithstanding the objections of the governor, May 11, 1927.

O. C. Gray,
Speaker of the House of Representatives.

The sectional numbers on the margin hereof are designated as provided by law.

Edward C. Turner,
Attorney General.

Filed in the office of the secretary of state at Columbus, Ohio, on the 12th day of May, A. D. 1927.

Clarence J. Brown,
Secretary of State."

THE JAMES PURDY QUIT-CLAIM GRANT

Paragraph 40. A special joint resolution was passed by the General Assembly of Ohio on March 12, 1845, 43

O. L. 453, authorizing the settlement with James Purdy for lands taken from him by the State of Ohio on the south side of the Maumee River at the Village of Grand Rapids, Wood County, Ohio, and for water taken from him and used in operating his mill on that side of the river; the water to be taken by the state from the pool in the Maumee River above the dam and to be used in the operation of the Miami and Erie Canal on the north side of said river.

In pursuance of this resolution the James Purdy quit-claim grant was made to the State of Ohio and a copy thereof is Stipulation Exhibit No. 7, Record 101. (See Paragraphs 4 and 15 of the stipulation and agreement on the evidence, Record 60, 64.) A copy of said resolution is as follows:

"RESOLUTION

Relative to the Adjustment of the Claim of James Purdy.

Resolved, by the General Assembly of the State of Ohio, that the board of public works are authorized to negotiate and purchase of James Purdy, the right to which he may be entitled, as riparian proprietor, to the water which the state may want, flowing in the Miami River at the Grand Rapids, over and above what she may need for the purposes of the improvement of navigation by her public canals; and in case the said Purdy shall desire to receive the price agreed on, in whole or in part, in the surplus water of said river, the board shall construct a side-cut from the pool above the state dam sufficiently large for the purposes of navigation and to carry the water to the mills of said Purdy, with a suitable guard lock therein, which side-cut shall be under charge of the board of public works, and subject to reasonable tolls. And in fixing the price to be paid for the

water to be purchased, the benefit and saving to the said Purdy, and the increased value of his property by reason of the building and support by the state of the state dam and the said side-cut, over and above his condition before the said state dam was erected, shall be taken into consideration, and in payment of the price agreed on by said Purdy; and the board may sell to said Purdy, to be taken through such side-cut, so much water as shall be agreed on, so that there shall at all times remain to the state water enough for her purposes of navigation, and to supply the hydraulic power, which she shall have rented; and any balance due to said Purdy, by said agreement, shall be paid as damages to others are paid by existing laws for injuries occasioned by construction of the public works.

Resolved, Further, that in case the said board and said Purdy cannot agree as to the price to be paid to him, or upon the quantity and value of the water to be given therefor, on application in writing by said Purdy, the auditor, secretary and treasurer of state, or a majority of them, shall appoint three judicious, disinterested persons, who, after giving ten days' notice to said Purdy and to said board, by letter, through the public mail, or by personal notice, shall make appraisement of the value of his right in said water, and determine the value and quantity of water to be transferred to him therefor according to the provisions of the first resolution above, subject to the determination of the board as to the quantity of water actually to be transferred to said Purdy, so that any balance due him shall be paid as provided in the first resolution.

Resolved, that upon the agreement between the parties being consummated, either amicably or by appraisal, the said Purdy shall execute a conveyance in fee, in the same manner as by law deeds of lands are made, of his interest in the water so purchased of him, and the board shall execute to

him a lease or other conveyance in fee, of the quantity of water to be conveyed to him free of rent, in their usual form of lease or conveyance. And if the said Purdy shall suppose that he has a legal claim to compensation from the state for the obstruction of water from the river necessary for the purposes of navigation in her canal, the right to apply to the Supreme Court for the settlement of the question of the legality of such claim, in manner as is provided by resolution of this session for certain claimants on the Miami River, shall remain unimpaired to said Purdy.

John M. Gallagher,
Speaker of the House of Representatives;
David Chambers,
March 12, 1845. Speaker of the Senate."

ATTEMPT OF THE STATE OF OHIO TO REVIVE NAVIGATION ON MIAMI AND ERIE CANAL

Paragraph 41. On April 25, 1898, the General Assembly of Ohio passed an Act in an endeavor to revive navigation on the Miami and Erie Canal. That Act is entitled and reads as follows:

"(House Bill No. 901)

AN ACT

To promote better facilities to operate boats on the Miami and Erie Canals.

Whereas, it is due to the taxpayers of the State of Ohio to obtain from the canals and inland waterways under the control of said state the greatest amount of revenue compatible with their most efficient use, which can only be done by affording merchants, manufacturers and shippers more rapid and economical transportation thereon for their products; and

Whereas, as a motive power on land it has been demonstrated that electricity, because of its cheapness and practicability is eminently success-

ful, and it is believed that the same results can be accomplished on water and that efforts to that end should be specially made, provided the same is done without any expense to the state; therefore,

Section 1. *Be it enacted by the General Assembly of the State of Ohio*, That the board of public works of this state be and is hereby authorized and empowered to grant by lease or permit to any party or parties or company the right to make any experiment with electricity as a motive power for the propulsion of boats or other craft on the Miami and Erie Canal by poles and overhead wires erected for such purpose, or by traction power on the berme banks or towing baths in such manner and under such regulations as said board of public works may direct, provided that animal or other motive power for the propulsion of boats as used at present is not to be in any manner interfered with. And, if such experiments with electricity when made should be found successful, said board may further grant by lease or license to such party or company, the right to operate and propel boats and other craft on said Miami and Erie Canal as aforesaid under the following regulations:

Section 2. Any party or company to whom a grant or license as provided for in Section 1, is made, may operate its own boats, but it shall be obligated to propel and operate all boats for hire when the owner may so desire, under and pursuant to such reasonable rules as to tonnage per mile or otherwise as the board of public works may fix if the parties are unable to agree.

Section 3. In any experiments made as aforesaid, or any act done in developing the practical application of electricity as a motive power, no expense shall be incurred by the state or the board of public works, and no contract for same shall be in force and effect until approved by the governor and attorney general.

Section 4. This Act shall take effect and be in force from and after its passage.

Harry C. Mason,
Speaker of the House of Representatives.
Asahel W. Jones,
President of the Senate.
Passed April 25, 1898. 2636"

Paragraph 42. On April 9, 1902, the General Assembly of the State of Ohio passed an Act in another endeavor to revive navigation on the canals of Ohio, but therein expressly authorized and ordered the board of public works to revise and readjust as to rentals all water-rate contracts then in existence on the Miami and Erie Canal and the northern division of the Ohio Canal. That Act is entitled and reads as follows:

"(House Bill No. 426)

AN ACT

To provide for the retention, maintenance and supervision of the canals of Ohio, their water supplies, reservoirs, dams, feeders and adjacent lands; to encourage the building of canal boats and the extension of cheap transportation.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That it is hereby declared as the settled policy of this state that the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo shall be retained and maintained as a public canal; also that the same policy is hereby declared as to the northern division of the Ohio Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cleveland to Dresden on the Muskingum River.

Section 2. That all boats hereafter built for use upon either of said lines of canal for freight trans-

portation shall be paid for by the state at their then true value in money if, at any time in the future, the policy of the state shall be changed by abandonment of either or both of said lines of canal so as to make such boats useless for transportation purposes.

Section 3. It is hereby declared as the settled policy of this state that the water supplies, reservoirs, dams, feeders and adjacent lands thereto of the southern division of the Ohio Canal from Dresden Junction to Lockbourne, and from Columbus to Portsmouth shall be retained and maintained. That within sixty (60) days after the passage of this Act, the governor of the state shall appoint a non-partisan commission consisting of two members, who, together with the state engineer, shall constitute a board of commissioners. The board of commissioners when appointed shall, with the assistance of a stenographer, which it is hereby authorized to employ to take all necessary testimony, proceed to investigate fully the condition of the southern division of the Ohio Canal, and all the facts bearing upon the question of its improvement, maintenance, its present and future usefulness as a canal, together with all possible information bearing upon this subject, and report the same, together with recommendations, to the next General Assembly, pending which report the same shall be kept open for navigation.

Section 4. The said board of commissioners, together with the board of public works, shall within the present year investigate all present water-rate contracts on the two lines of canal mentioned in Section 1, and revise and readjust them upon a fair and equitable basis as to the rents to be paid in the future.

The board of commissioners and the board of public works shall also investigate the water rent contracts upon the lines of the canal mentioned in Section 3, and make a special report to the next

General Assembly as to what extent the rates for water rent may be increased.

Section 5. The members of the board of commissioners, other than the said engineer, shall each receive as compensation for their services under this Act, the sum of $10.00 per day, provided the time employed in the performance of said duties shall not exceed ninety days, unless such time be extended on the certificate of the governor filed in the office of the auditor of state. Said members shall also be entitled to receive their actual expenses incurred while in the performance of their duties, and such reasonable compensation for the services of a stenographer as the board of commissioners may allow, and shall be paid by warrant on the treasurer of state, upon vouchers being filed in the office of the auditor of state and approved by the state engineer.

Section 6. This Act shall be in force from and after its passage.

W. S. McKinnon,
Speaker of the House of Representatives.
Carl L. Nippert,
President of the Senate.
980

Passed April 9, 1902."

Paragraph 43. On May 8, 1861, the General Assembly passed an Act providing for the leasing of the public works of the state. The title and Sections 1 and 11 of that Act are as follows:

"AN ACT

To provide for leasing the public works of the state.

Be it enacted by the General Assembly of the State of Ohio, as follows:

Section 1. That the governor, auditor, and treasurer of state be and they are hereby authorized and required, as hereinafter provided, to

lease, for the term of ten years, from the day of the approval of the bond herein required, the public works of the state, consisting of the Miami and Erie Canal, Ohio Canal, Walhonding Canal, Hocking Canal, Sandy and Beaver Canal, Muskingum Improvement, and Western Reserve and Maumee Road, and all the side-cuts, feeders, reservoirs, lockhouses, collectors' offices, weigh-locks, and leases of surplus water connected with the same or appertaining thereto, and owned by the state, for the purpose of being used in connection therewith, with the right to have additional surplus water; and all moneys derived from the leasing of said public works shall be paid into the treasury of the state.

Section 11. Whenever in the opinion of the lessee or lessees of any of the water power on said canals or slack water improvement, the said lessee or lessees of the public works do not supply him or them with the surplus water, as provided in their water leases, according to the true intent and meaning of the same, the said lessee or lessees of the water power may make complaint in writing to the board of public works, who shall examine into the truth of said complaint, and if the same be, in their opinion, well founded, the member of said board in whose division the said water power is located, shall forthwith notify the lessee or lessees of the said public works of the nature of the injury complained of, and the said lessee or lessees of said public works shall without any unnecessary delay correct the same, and in default thereof for the injuries sustained by them, the said lessee or lessees of water power may then have and maintain an action directly against said lessee or lessees of said public works, their sureties or their assignees, for the amount of such damage or injury sustained; and the said lessee or lessees of said public works shall have the same right as the state now has, when the water leases

are forfeited for non-payment of rent or other cause, or expire, to re-enter and lease again with the consent of the board of public works, in writing, said water privileges for such period of time not exceeding the unexpired part of said ten years' time."

ADDENDUM

In our hurry in preparation of this brief, because of the advancement of the case for hearing, we missed our notes for discussion of the stated point of appellants' claiming that the state is bound to allow the water to follow the natural channel of the Maumee River since the passage of the Act attacked in the cause.

Section 8 of the Act of February 4, 1825 (2 Chase, p. 1472, Appendix, page 200), gave the state power to enter upon, take possession of and use not only lands but *waters*, *streams* and materials as well, necessary for the construction and operation of the canal.

All lands and waters thus acquired were acquired in fee simple under the express terms of Section 8 of the Act of 1825.

Malone vs. Toledo, 34 O. S. 541, 546, 547.

All parties interested in the waters must at this date be held to have been paid therefor or to have waived all rights thereto.

Malone vs. Toledo, *supra*, 549.

Cooper vs. Williams, 4 O. Rep. 287.

In acquiring the waters the state was not expressly prohibited from using them for purposes other than navigation in the canal and the specific purpose for which they were acquired operates as a limitation of *quantity* and not of character of *use*.

State vs. Middletown Hydraulic Co., 114 O. S. 438, 457, 458.

U. G. Denman,
Karl E. Burr,
Counsel for Appellee.